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IN THE

Supreme Court of the United States

OCTOBER TERM, 19[redacted] 60 61

No. [redacted] ## 7

JOHN JOSEPH KILLIAN,
Petitioner.

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Petitioner prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Seventh Circuit which affirmed a judgment of conviction in the United States District Court for the Northern District of Illinois, Eastern Division. The conviction was on both counts of a two count indictment charging violation of 18 U. S. Code, § 1001, by the making and filing of a false affidavit under § 9(h) of the Taft-Hartley Act, 29 U. S. Code § 159(h).

OPINIONS BELOW.

The opinion of the court below is not yet reported. The first opinion of the Court below is reported at 246 F. 2d 77. Both opinions are appended hereto (pp. 28 to 57), *infra*.

JURISDICTION.

The judgment of the Court of Appeals was rendered on January 11, 1960. Petition for rehearing was denied on April 13, 1960. On May 4, 1960 Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including June 12, 1960.

Jurisdiction of this Court is conferred by 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the evidence in this case was sufficient in the following respects to support a judgment of conviction of violation of 18 U. S. Code, § 1001 by filing a false affidavit of non-Communist Union Officer with the National Labor Relations Board's Regional Office, Chicago, Illinois:

   a. The record is silent as to any acts of Communist Party membership or affiliation by petitioner for some thirteen months prior to the filing and some three months thereafter.

   b. The sole evidence of petitioner's Communist Party membership or affiliation is the testimony of a single uncorroborated witness.

   c. The only evidence that petitioner acted knowingly and willfully, *i.e.*, that he knew that the affidavit was to be submitted to a government agency, and that he signed it for the purpose of using the facilities of the National Labor Relations Board, is the mere fact that petitioner signed the affidavit.

d. There is no evidence that the petitioner's union made any use of, or attempted to use the machinery of the National Labor Relations Board while petitioner was an officer of the union.

e. There is no evidence that activities of the petitioner, his union or his employer affect commerce or that the union represented "employees" as defined by the National Labor Relations Act.

f. The evidence did not show that the National Labor Relations Board first received the affidavit in the Eastern District of Illinois.

2. Whether § 9(h) of the Labor Management Relations Act (29 U. S. Code § 159(h)), and 18 U. S. Code § 1001 as here applied are a Bill of Attainder and violate petitioner's rights under the First Amendment to freedom of speech and assembly.

3. Whether the instructions to the jury properly defined membership in and affiliation to the Communist Party.

4. Whether the instructions to the jury properly defined the kind of actual knowledge and specific intent required for a verdict of guilty of violation of 18 U. S. Code § 1001.

5. Whether the court erred in refusing to give cautionary instructions on the testimony of paid informers.

6. Whether the production of statements which report payments to those witnesses, as informers, is excused after a complete foundation for their production under 18 U. S. Code § 3500 is laid, when all that the government has offered to produce at trial is a list of the amounts and dates of payments and there is no evidence as to what other facts are reported in those statements.

7. The government presented the testimony of three witnesses concerning petitioner's participation in or sub-

scription to the program, activities and policies of the Communist Party. The purpose of this evidence was to show the special characteristics of membership in the Communist Party and the quality of petitioner's alleged membership. The trial court refused to order the production of any prior statements of these witnesses relating to Communist Party program, activities and policies other than those reports relating to the immediate incidents testified to by the witnesses on direct examination. The question presented is whether under these circumstances the production of the witnesses' statements which relate to the program, activities and policies of the Communist Party was excused under § 3500(b) as being beyond the scope of the direct examination.

8. Whether the trial court erred in permitting the prosecution to introduce irrelevant, prejudicial and highly inflammatory evidence of the program, activities and policies of the Communist Party and its members at times when, and places where, petitioner's membership in the Communist Party was not at issue in the case.

9. Whether the trial court erred in permitting the prosecutor to argue to the jury from the failure of the defense to use the statements of witnesses produced under 18 U. S. Code § 3500, when the statements were not in evidence.

10. Whether the trial court erred in permitting the prosecutor to give unsworn testimony in his summation.

STATUTES INVOLVED.

The statutes involved are 18 U. S. Code § 1001, 29 U. S. Code § 159(h) and 18 U. S. Code § 3500. These statutes are set forth in an Appendix (pp. 25 to 28, *infra*).

STATEMENT OF THE CASE.

1. Petitioner was indicted under 18 U. S. Code § 1001. The substance of the indictment charged in two counts that petitioner had on December 11, 1952 knowingly and willfully, and in a matter within the jurisdiction of an agency of the United States, filed a materially false "Affidavit of Non-Communist Union Officer", the oath required by § 9(h) of the Taft-Hartley Act. The allegedly false statements were that petitioner was not on that date a member of the Communist Party (Count I), nor affiliated with it (Count II).

This petition is taken from the Court of Appeals decision affirming the judgment of conviction upon the second trial of that indictment, petitioner's first conviction having been reversed by the Court of Appeals, upon the authority of *Jencks* v. *United States*, 353 U. S. 657, *United States* v. *Killian* (7 Cir., 1957), 246 F. 2d 77.

2. The prosecution's case at trial rested primarily upon the testimony of a single witness, Ondrejka, who testified that he had been a paid informer for the Federal Bureau of Investigation for the period 1949-1954 during which time he had been a member of the Communist Party (tr. 408).* From February 1951 until the date of his testimony he was employed by the Allen-Bradley Company, Milwaukee, Wisconsin (tr. 406), where defendant was also employed (tr. 55).

Ondrejka's testimony placed petitioner, participating as a member, at a Communist Party meeting in April 1951 (tr. 416) and at a Communist Party class in June 1951 (tr. 421). Around November 15, 1951, Ondrejka met with petitioner and their respective wives to form a Communist Party unit at the Allen-Bradley Company (tr. 424-427).

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* Page references prefaced by "tr." are to the stenographic record of the trial proceedings.

For the subsequent 16 months, until February 1953, the record does not show any payment of Communist Party dues by petitioner, nor any attendance at Communist Party meetings, nor any other activity probative of Communist Party membership or affiliation. It was during this period, eleven months after the last meeting with Ondrejka, that petitioner was appointed an interim member of the executive board of the Local Union at the Allen-Bradley Company (tr. 109). Two months thereafter he signed the affidavit. All that the record shows for proof of membership in this period is Ondrejka's conclusory testimony (admitted over objection) that he "knew" the petitioner to be a Communist in the period 1951-1953 (tr. 411-414) and that in the Fall of 1952 petitioner would stop at Ondrejka's place of work and they would discuss "Party affairs" (tr. 430-431). (The substance of these discussions is not reported.)

Subsequently, from the end of February 1953 until August 1953 Ondrejka and petitioner met at several Communist Party meetings and engaged in Communist Party activities.

Ondrejka testified under oath that while employed by the Federal Bureau of Investigation he had courted and married his wife who had borne him three children in this period. At all times during their courtship and marriage Ondrejka had reported his wife's activities as a member of the Communist Party to the Federal Bureau of Investigation. He had never informed his wife that she was under surveillance (tr. 509-513).

The prosecution attempted to bolster Ondrejka's testimony by testimony from two other witnesses, Fensholt (tr. 158 to 182) and Sullivan (tr. 302 to 328) showing petitioner's membership in the Communist Party in 1949 and 1950 while petitioner was a student at the University of Wisconsin.

3. The prosecution also elicited testimony from these three witnesses designed to show the nature of Communist Party membership and the quality of petitioner's alleged allegiance to the Communist Party. The admission of this testimony is assigned as error.

The witness Fensholt testified that in 1949 he had received assignments to work in the Young Progressives of America, to attempt to reactivate the National Lawyers Guild on campus, and to recruit a Negro student into the Communist Party (tr. 173).

Sullivan testified extensively concerning the procedures of his transfer to the Wisconsin Communist Party from Cincinnati, Ohio in 1949 (tr. 305-309) and about the organizational structure of the Communist Party in Madison, Wisconsin in 1949 (tr. 310-311). Defendant and defendant's wife had urged him to associate with Communist girls and had introduced him to such a girl (tr. 314-316). At a Communist Party meeting a speaker praised Communist China, and discussing the united front tactic of the Communists, had said it was an important one (tr. 319). At this meeting the speaker stated that an applicant for federal employment could conceal his membership in the Communist Party (tr. 321). At another Communist student meeting the petitioner had led a discussion of the united front tactic of work in non-Communist organizations (tr. 324-325).

Ondrejka testified concerning a series of Communist Party educational meetings in the Spring of 1951 in Milwaukee. The subjects discussed included the Communist attitude toward war, the international tension and the Party's attitude to it, the national liberation movement and colonialism, the Party peace program, and the local problems of Communist work in the united front (tr. 419). Petitioner had supposedly lectured on colonialism in the Far East, saying that capitalist countries were leeches on

the colonial countries, that only with the guidance and leadership of the Communists could the colonial peoples overthrow their capitalist oppressors (tr. 422-423).

Ondrejka testified that in late February, 1953, at a meeting of the Communist Party, plans were made to start a branch of the Labor Youth League among the employees of the Allen-Bradley Company (tr. 437). He was instructed as a Communist to "smear" a fellow member of the union (tr. 441-443). Ondrejka also testified to plans for a Communist Party fund drive (tr. 448), and a mailing of the May Day issue of the Daily Worker to the union's stewards at Allen-Bradley (tr. 448-449).

4. Petitioner was appointed a member of the executive board of Local 1111, United Electrical Radio and Machine Workers of America (UE) in October 1952. His term of office lasted until February 28, 1953 (tr. 110). On December 9, 1952, the Local President, Kuehne, asked the union officers to come to the union office, where they signed non-Communist affidavits and left them (tr. 113, 119). There was no meeting, the officers coming into the union office over a period of two hours, signing the affidavit and leaving (tr. 118-119). There was no discussion about the significance of the affidavit either prior to, or at the time of signing (tr. 104). None of the signers, including petitioner, read the back of the affidavit where the purpose and effect of filing the affidavit are set out (tr. 118).

Kuehne could not testify of his own knowledge whether or not the signed affidavits were mailed or where they were sent (tr. 119-120). On December 11, 1952 they were received in the Chicago office of the National Labor Relations Board, but it is not known whether they were received by mail or hand delivery or from whom (tr. 32).

5. There was no evidence that at any time between December 11, 1952 and March 1, 1953, Local 1111 made any use or attempted to make any use of the Board machinery.

There is no evidence that its activities were in an industry affecting commerce or that it represented workers within the purview of the National Labor Relations Act.

6. As informers, Ondrejka and Sullivan received payments from the Federal Bureau of Investigation (tr. 500-505, 506, 369-375). Sullivan had given signed reports concerning these sums (tr. 373). Inquiry into the kind of information in these reports was foreclosed by the trial judge (tr. 373-374, 375). Ondrejka had reported his expenditures to an agent of the Federal Bureau of Investigation who wrote them down (tr. 506). The trial judge foreclosed inquiry into whether Ondrejka then signed those statements and into their full contents (tr. 506-509). A general demand was made by the defense for all of Sullivan's and Ondrejka's statements to the government (tr. 330, 455). A specific demand was made for Ondrejka's statements containing the sums received by him (tr. 547-552). The prosecution offered to produce instead a schedule of dates and amounts of payment. This offer was rejected by the defense as inadequate, and the court denied the defense motion (tr. 547-552).

The trial court likewise permitted the prosecution to refuse to produce, pursuant to § 3500, all the prior statements of its witnesses concerning the nature of the Communist Party activities and its program and policies, and to limit the production of such reports to reports of the specific meetings and activities testified to by the witnesses on their direct testimony.

7. Error is assigned to the failure of the trial court to instruct the jury correctly with reference to the statutory requirements that allegedly false statements be made "knowingly" and "willfully", the trial judge's definition of membership in and affiliation with the Communist Party, and his refusal to give a cautionary instruction concern-

ing the testimony of paid informers. These instructions are set forth in an appendix, pp. 57 to 61, *infra*.

8. In his summation to the jury the prosecutor referred to the reports of the government witnesses Fensholt, Sullivan, and Ondrejka, to argue as affirmative evidence of guilt the failure of the defense to contradict the witnesses from these reports (tr. 666). In his summation the prosecutor also made the following unsworn statement with reference to the witness Ondrejka:

> "He was married. The question was asked 'You do not know what the answer is and do not assume you know,' We Know. We talked about it out of your presence." (tr. 655.)

REASONS FOR GRANTING THE WRIT.

1. The representation required to be made by an affiant under § 9 (h) is a narrow one. The affiant swears that he "is not" a member of or affiliated to the Communist Party. Proof of membership or affiliation on another date will not suffice. The prosecution did not show membership on December 11, 1952. The case should have been dismissed by the trial court.

The Court of Appeals, upholding the conviction, relied on the testimony of Ondrejka that he had met with defendant as a Communist in November, 1951 (more than a year before the affidavit was signed), and sixteen months later, on February 22 or February 23, 1953, plus the conclusory statements of Ondrejka (admitted over objection) that he knew the petitioner to have been a Communist from 1951 through August, 1953, and that he had talked with petitioner concerning Communist Party affairs in the fall of 1952. Since the latter two items are plainly insufficient to prove membership or affiliation, the government's case must rest upon the theory that membership and affiliation were shown because it had bracketed the date of sig-

nature by proof of membership at both ends of the sixteen months' period within which the oath was taken.

Such proof cannot overcome the presumption of innocence. Realistic inferences would compel the opposite conclusion, that petitioner, preparing to seek union office, or because of ideological disillusion, severed his Communist connections which he only resumed when he was prepared to abandon union office or when the ideological rupture was healed. The presumption of continuance underlying the theory of the court below is not permissible here. In *Amalgamated Meat Cutters, etc.* v. *National Labor Relations Board*, 352 U. S. 153, Mr. Justice Frankfurter (concurring) noted that even the conviction of a union official for filing a false 1950 affidavit did not sustain the inference that the 1951 affidavit was also false. *C. f. Maggio* v. *Zeitz*, 333 U. S. 56. *A fortiori*, it is impermissible in criminal cases to presume that a status which is innocent continues after the occurrence of events which makes that status criminal. *Wolf* v. *United States* (8 Cir.), 259 Fed. 388; *Colt* v. *United States* (5 Cir.), 158 F. 2d 641.

Hupman v. *United States* (6 Cir., 1955), 219 F. 2d 243, *cert. den.* 349 U. S. 953, did not rest upon a presumption of continuance but upon direct evidence of that defendant's prior agreement to conceal his Communist Party membership.

Serious constitutional problems are raised by the application of § 9(h) in this case. In *American Communications Association* v. *Douds*, 339 U. S. 382, the statute was upheld against the claim it was a bill of attainder and violative of the First Amendment because the oath related only to membership at the time of filing, and permitted a member to abandon his membership on filing and resume it when surrendering his status as a union officer. 339 U. S. at pp. 404, 414. The statute reaches only the "combination" of Communist membership and union activities, 339 U. S. 403. The "permissible inference" of continuance of the

court below transcends the constitutional limitation. The oath would be unconstitutional if it were to relate to past membership and forswear future membership. It is equally unconstitutional if these requirements are not included in the oath, but inserted at one step removed as sufficient proof of guilt on a trial for false swearing.

2. Even in the ordinary criminal case where the government's case may stand or fall on the jury's belief of one witness, his testimony is subject to close scrutiny. *Gordon* v. *United States*, 344 U. S. 414, 417. The continued vitality of the special rule governing perjury prosecutions testifies to the special distrust of the kind of testimony presented in cases involving false swearing. Historically prosecutions involving some aspect of the First Amendment are the particular domain of the paid informer whose testimony is recognized as unreliable. 3 Wigmore § 969, Bowers: *Jefferson and the Bill of Rights*, 41 Va. Law Review 709, 721; Donnelly: *Judicial Control of Informants*, 60 Yale Law Journal 1091; *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115; *Mesarosh* v. *United States*, 352 U. S. 1; *Jencks* v. *United States*, 353 U. S. 657; *Fisher* v. *United States* (9 Cir., 1956), 231 F. 2d 99; *Fletcher* v. *United States* (D. C. Cir., 1946), 158 F. 2d 321; *Cratty* v. *United States* (D. C. Cir., 1947), 163 F. 2d 844. Ondrejka admitted that while courting his wife, and during their marriage in which she bore him three children, he was regularly reporting her activities to the Federal Bureau of Investigation. It is difficult to find words for the moral caliber of a man who would not only permit his wife, without remonstrance, to engage in an activity which he knew was under police observation, but would himself report her activities to the police. It is immoral that the petitioner should be convicted of making false statements on the uncorroborated testimony of such a man.

3. The ruling below that the affidavit was material conflicts with the ruling of the Court of Appeals in *Jencks* v. *United States* (5 Cir., 1956), 226 F. 2d 540, 550, that for

conviction the prosecution was required to show use of the affidavit in connection with a Board proceeding. This conflict is a part of a deeper conflict in principle among the Courts of Appeals as to whether or not by the use of § 1001, a highly penal criminal statute, the federal government may bootstrap itself into a power over private citizens which goes beyond the limits Congress has placed upon the power of the various federal agencies, or whether the requirement of materiality narrows the area of criminality even as to statements which may be within the agencies' statutory jurisdiction. *United States* v. *Moore* (5 Cir. 1950), 185 F. 2d 92. See *Freidus* v. *United States* (D. C. Cir., 1955), 223 F. 2d 598; *Weinstock* v. *United States* (D. C. Cir., 1956), 231 F. 2d 699, 701-702.

In *Weinstock* Judge Prettyman defined a material representation as one that "has a natural tendency to influence, or was capable of influencing the decision of the tribunal in making a determination required to be made." If Judge Prettyman's definition be followed, then the petitioner's affidavit was not material, since by the terms of § 9 (h) no determination was required to be made by the Board until an unfair labor practice charge or representation petition was filed by the petitioner's union. The mere fact that the affidavit was moldering in the Board files makes no difference. It could just as well have been kept in the union files pending need for its production to the Board for all the materiality of its influence on any Board proceeding, *Terry* v. *United States* (8 Cir., 1942), 131 F. 2d 40.

4. Related to the statutory requirement of materiality is the requirement that the statement be made "within the jurisdiction" of a federal agency. The statutory authority of the National Labor Relations Board is limited to matters "affecting (interstate) commerce," *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41. Since the record is barren of proof of any activity on the part of the defendant, his union, or his employer affecting interstate com-

merce, the ruling below reveals a sharp division among the Courts of Appeals as to whether the jurisdictional requirement of § 1001 refers to the statutory jurisdiction of the agency or includes statements which the agency may receive or even solicit, but concern matters over which the agency has no power. The decisions in *Rolland* v. *United States* (5 Cir., 1953), 200 F. 2d 678; *United States* v. *Moore* (5 Cir., 1950), 185 F. 2d 92; and *Terry* v. *United States* (8 Cir., 1942), 131 F. 2d 40, limit the scope of § 1001. The decisions below expand it.

In *United States* v. *Gilliland*, 312 U. S. 86, 93, this Court spoke of the statute as designed to protect the "authorized" functions of government. This limitation is obviously transcended if the agency may expand its jurisdiction through the use of the criminal law by reason of a defendant's false answers to questions which, because he was not, and could not be made subject to the act, could not have adduced material answers. (*United States* v. *Moore, supra*, at page 95.)

5. The instructions below on the issues of scienter and intent do not follow the ruling of this Court in *Douds* that a conviction under § 1001 requires proof of a specific criminal intent and actual knowledge, rather than a general imputed intent based on constructive knowledge. The *Douds* opinions make it clear that this position is constitutionally grounded to avoid invalidating vagueness under the First and Fifth Amendments. Moreover the rulings below are in conflict with the Court of Appeals decision in *Jencks* v. *United States* (5 Cir., 1956), 226 F. 2d 540, 550 which applied, in a § 9 (h) prosecution the intent and scienter requirements laid down by this Court in *Douds*, as well as with the decision in *Freidus* v. *United States* (D. C. Cir., 1955), 223 F. 2d 598, where the same requirements were applied in a prosecution under § 1001, not involving § 9 (h).

The Court of Appeals approval of the trial court's instructions permitted conviction upon a finding of constructive rather than actual knowledge and imputed rather than specific intent. The trial judge rejected the defense request to instruct the jury that the affidavit must have been filed for the purpose of inducing the National Labor Relations Board to act (tr. 603). He instructed the jury that the indictment's charge that defendant acted "knowingly" meant merely that he had acted voluntarily as opposed to acting accidentally (tr. 675), and that the natural consequences of acts knowingly done were presumed to be intended (tr. 673-674).

Screws v. *United States*, 325 U. S. 91, was cited in *Douds* as illustrating the type of specific intent required for conviction under § 1001. Under the *Douds* decision therefore "an evil motive to accomplish that which the statute condemns becomes a constitutent element of the crime." *Screws* v. *United States*, at p. 101. "It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act." *Morrisette* v. *United States*, 342 U. S. 246, 274. Just as "knowing conversion requires more than knowledge that defendant was taking the property into his possession" (*Morrisette* v. *United States*, at pp. 270-271), so a knowing and willful violation of § 1001 requires more than knowledge by the defendant that he was signing a non-Communist affidavit.

The proof of these elements of the statutory crime was likewise defective. The requirement of § 1001 that the allegedly false statements be made "knowingly" and "willfully" include at least the following elements: (1) The defendant's actual knowledge that he was filing the affidavit; (2) defendant's actual knowledge that it was necessary to file the affidavit to obtain the advantages of the Act; and (3) the defendant's specific intent to obtain the

advantages of the Act. See *Jencks*, 226 F. 2d at p. 550. As the opinion below indicates, the sole evidence of these elements is the bare fact of signing the affidavit plus defendant's education and his labor and political background. The barrenness of this record is highlighted by contrast with *Jencks* where the government produced evidence of Jencks' own statements of why he had filed the affidavit, as well as evidence that Jencks himself had filed unfair labor practice charges with the Board.

6. The approval by the Court of Appeals of the trial court's instructions to the jury on the key issues of membership in and affiliation with the Communist Party conflict with decisions of this Court and of other Courts of Appeals. The instructions failed to properly limit and define those terms and were confusing and unconstitutionally vague.

In *Jencks* v. *United States, supra,* Mr. Justice Burton cited with approval the definition of membership in *Fisher* v. *United States* (9 Cir., 1956), 231 F. 2d 99, 107, which defined membership as a consensual status between the alleged member and the organization plus the performance by the alleged member of the objective acts required for membership. This Court in *Douds* likewise recognized that membership was an objective act involving more than "the state of a man's mind." This Court said, "the act of joining is crucial" (339 U. S. at p. 411). The trial court here defined membership solely in terms of a state of mind, omitting any reference to the need for the objective acts required for membership.

The error of failure to define membership properly was accentuated by the listing of twelve matters the jury "might take into consideration" as "indicia of Communist Party membership." Although these indicia differ in part from those raised before this Court by the petition for a writ of certiorari in *Travis* v. *United States* (No. 479,

October term, 1959), they suffer from the same vice. The indicia may have occurred in the remote past. Most are either equally or more consistent with non-membership than with membership.

This is vagueness with a vengeance. The jury was permitted to base a finding of membership on proof either of affiliation, or of support, or even of a remote association with the Communist Party. The instructions not only left the definition of membership in the Communist Party to the juror's own prejudices, it left to those same prejudices the selection of the evidence which might constitute legitimate proof of membership. Defendant was deprived of due process. *Lanzetta* v. *New Jersey*, 306 U. S. 451. Moreover, since the charge permitted conviction on the basis of constitutionally protected speech or associations petitioner's conviction violated the First Amendment. *Winters* v. *New York*, 333 U. S. 507; *Stromberg* v. *California*, 283 U. S. 359; *DeJonge* v. *Oregon*, 299 U. S. 353.

The trial court's definition of "affiliated" was equally defective. Although the jury was instructed that "affiliated" meant a relationship of less than membership, it was likewise instructed that the term meant the "equivalent of membership in all but name" and "a close working alliance between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it upon a fairly permanent basis." Thus, the nearly meaningless definition of "affiliated" was so broad and vague that the jury was permitted to equate it either with the defective definition of membership, since it was given no criteria with which to distinguish the two statuses, or with mere support of the Communist Party in its legitimate objectives. The confusion was compounded by the refusal of the requested instruction that a verdict of guilty

could not be returned on both counts, although it would seem obvious that one cannot at the same time have membership status and a relationship less than membership.

Further error was committed by the trial court in refusing the requested instruction that affiliation was not mere cooperation with the Communist Party in its lawful objectives. Thus the decision below conflicts with the decisions of this Court, *Bridges* v. *Wixon*, 326 U. S. 135, and of other Courts of Appeals, *Bryson* v. *United States* (9 Cir., 1956), 238 F. 2d 657; *Fisher* v. *United States, supra.*

7. The fact that the instructions on membership and affiliation opened the door to a conviction based upon the prejudices of the jurors, makes the introduction of remote and prejudicial evidence by the prosecution particularly erroneous. Item after item in the testimony was calculated to arouse the jury's personal antagonism to petitioner, adding little, if anything, of probative value to the decision of the issues framed by the indictment. What reaction is to be expected from a jury in today's world to testimony that Communists were happy with the growing strength of Red China? What overtone of conspiracy, of Hiss, Coplon and the Rosenbergs, lies in the testimony of statements—not linked to or adopted by the petitioner —that government employees might conceal their Communist Party membership? "The reverberating clang of those accusatory words would drown all weaker sounds." *Shepard* v. *United States*, 290 U. S. 96, 104. See also *Keegan* v. *United States*, 325 U. S. 478.

8. The reports given by the prosecution witnesses Sullivan and Ondrejka of payments received as informants for the Federal Bureau of Investigation were "statements" within the meaning of 18 U. S. C. § 3500. Sullivan signed his receipts. Ondrejka may have signed his. His oral statement was recorded by an agent of the government. The statements plainly relate to the subject matter as to

which the witnesses testified. *Rosenberg* v. *United States*, 360 U. S. 367. The ruling below, which sustained the refusal of the trial court to order production of these receipts even for its own preliminary examination, thus raises an important question concerning the administration of justice in the federal courts and is in conflict with the decision of this Court in *Gordon* v. *United States*, 344 U. S. 414.

The prosecution's offer of a schedule of dates of payment and amounts was not an adequate substitute for the statutory requirement. One of the premises of the statute is that defense counsel can use the original statements of a witness as an instrument of truth. The ruling below defeats the statute by permitting the prosecution to furnish the defense with its own bowdlerized version of the statement.

In the *Rosenberg* case, the trial court and the reviewing courts had before them the statements involved. In this case since the statements were never produced, neither the courts nor counsel can say whether the failure to produce them was harmless error or no. (The stubborn refusal of the prosecution to produce these documents at two trials suggests that they contain matter helpful to the defense.) The ruling below is thus in direct conflict with the decision of this Court in *Gordon* v. *United States*, 344 U. S. 414, where this Court said (at page 420):

> "For production purposes it need only appear that the evidence is relevant, competent, and outside any exclusionary rule; for rarely can the trial judge understandingly exercise his discretion to exclude a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or if so, it was harmless."

9. Important issues concerning the scope of § 3500, and

the respective roles of the judge and prosecutor thereunder, are raised by the trial court's refusal to order the production of all the statements by Sullivan and Ondrejka relating to policies, activities and program of the Communist Party in the possession of the government. The scope of the statements to be produced under § 3500 is as broad as the direct testimony of the witnesses. *Palermo* v. *United States*, 360 U. S. 343, 349. In this case the prosecution attempted to prove defendant's Communist Party membership on December 11, 1952, not only by proving membership in the Communist Party from 1949 until his election as a union officer, but by introducing evidence of Community Party activities in which he was supposedly involved, the program of the Communist Party, and statements of Communist Party members from 1949. It was the government's theory that they would thereby prove the quality of appellant's past membership, *i.e.*, the nature of the Communist Party, its program and membership practices and defendant's allegiance thereto. This theory was accepted by the trial court which refused to instruct the jury that the Communist Party activities and program were not in issue or evidence of guilt (tr. 604). It was overtly and covertly argued to the jury as a basis for conviction (tr. 626, 629, 631, 640, 641, 642).

Once the prosecution had adopted this method of proof, the defendant was entitled by § 3500(b) to all statements of the witnesses which related to the nature of membership in the Communist Party and its program. Obviously the defense has no direct evidence that such statements exist. That they do exist is indicated by the excisions in, and gaps between the reports given the defense. It is made a certainty by the fact that Sullivan and Ondrejka were paid for many years to make just such reports.

The trial court refused to order the production of statements which did not refer specifically to the defendant

(tr. 243-244). That is not the test of § 3500(b) and the trial court's refusal to order the production of the witnesses' statements, relating to the subject of their direct testimony was error. Underlying the error was the court's fundamental misconception of the respective roles which § 3500 assigns to the prosecutor and the trial judge. The prosecutor claimed for himself the right to make the decision which the statute gives the trial judge.

> "• • • determining what constitutes these reports, oral and written statements made to the Federal Bureau of Investigation by the witness, which relate to his direct examination are a responsibility of the Government, and, as such, the entire judicial process is one which must rely upon the integrity and the desire for fairness of the Government and its attorneys" (tr. 253-254, see also tr. 256, 261, 351, 354-356, 489-491).

The trial judge and the Court of Appeals accepted the right of finality of determination which the government claimed. Throughout the record the court sustained objection to inquiries by the defense into the existence of statements other than those the prosecution saw fit to produce, and into whether they came within the scope of § 3500 (tr. 193, 194, 196, 200-205, 241-244, 253, 256, 261, 350-351, 489-491).

While § 3500 relies upon the government not to conceal or falsify evidence wilfully, this does not mean that the section gives to a party litigant the right to make a complete determination of its own case. § 3500 is implicit with the final authority of the trial judge subject to the appropriate review of the appellate courts. Where a doubt might exist as to the applicability of the section the statement should be submitted to the trial judge for an *in camera* determination and review upon appeal. This was the procedure approved by this Court in *Palermo* v. *United States*, 360 U. S. 343, to determine whether a particular

statement came within the scope of § 3500(e). That procedure should likewise have been followed in determining whether the statement came within § 3500(b).

The attempt by the Court of Appeals to reconcile the trial court's practice with the *Palermo* opinion, distorts the doctrine of that case. The primary burden does not lie on the defense to show "of record" that the government was remiss. The primary obligation lies upon the trial court to order the production of statements when a doubt is indicated as to the prosecutor's right to withhold them. This Court's suggestion that a trial court might fashion proper procedures to determine whether a statement should be produced did not establish a fixed rule that defense counsel must either demand an *in camera* interrogation of witnesses or lose the right to complain of a violation of the section. The record is clear that defense counsel made repeated efforts to determine whether all producible statements had been produced and that the trial judge, regarding the prosecutor's decision as final, frustrated these attempts.

CONCLUSION.

This Court has already granted writs of certiorari in *Campbell* v. *United States*, 362 U. S. 909, and *Travis* v. *United States* (No. 479, October Term, 1959), to review certain aspects of some of the questions raised here. As to those questions it is submitted that a writ should issue here so that this Court may consider the whole of the problem in the light of the special facts arising in this case. The remaining questions likewise present important problems. Conforming oaths proliferate. It is in trials for false swearing that the practical impact of conforming oaths upon the First Amendment may be measured. The problems raised in such trials should be resolved by this Court.

It is respectfully submitted that a writ of certiorari should be granted to review the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX.

STATUTES INVOLVED.

18 U. S. C., Sec. 1001:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

18 U. S. C., Sec. 3500:

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to

be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statements to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

1. a written statement made by said witness and signed or otherwise adopted or approved by him; or

2. a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595.

29 U. S. C., Sec. 159(h):

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits. July 5, 1935, c. 372, Sec. 9, 49 Stat. 453; June 23, 1947, 3:17 p. m., E. D. T., 120, Title I, Sec. 101, 61 Stat. 143; Oct. 22, 1951, c. 534, Sec. 1 (c. d), 65 Stat. 601.

OPINION OF JUNE 10, 1957.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

No. 11967 September, 1956 Term—April, 1957 Session.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN JOSEPH KILLIAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

June 10, 1957.

Before DUFFY, *Chief Judge*, and FINNEGAN and LINDLEY, *Circuit Judges.*

DUFFY, *Chief Judge.* Defendant was convicted on both counts of a two-count indictment charging violation of Title 18 U.S.C. § 1001.[1] This section is incorporated by reference in the Taft-Hartley Act, 29 U.S.C. § 159(h).[2]

1. Section 1001: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749."

2. "Sec. 159(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-

The indictment charged defendant made false statements to a Government Agency, namely, the National Labor Relations Board, in a matter within the jurisdiction of that Board.

On December 9, 1952, defendant executed an affidavit of a noncommunist union officer. The form and wording of the face of the affidavit appears in the margin.[3]

The first two instructions on the reverse side were, in pertinent part, as follows:

"WHO MUST FILE.—This affidavit must be filed by each officer of a labor organization before that organization may

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month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unti that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of sections 286, 287, 1001, 1022, and 1023 of Title 18 shall be applicable in respect to such affidavits. As amended June 23, 1947, 3:17 p.m. E.D.T., c. 120, Title 1, § 101, 61 Stat. 143; Oct. 22, 1951, c. 534, § 1 (c, d), 65 Stat. 601."

3 "United States of America
National Labor Relations Board
Affidavit of Noncommunist Union Officer
Local 1111, United Electrical, Radio and Machine Workers of America (UE)
United Electrical, Radio and Machine Workers of America (UE)

The undersigned, being duly sworn, deposes and says:

1. I am a responsible officer of the union named below.
2. I am not a member of the Communist Party or affiliated with such party.
3. I do not believe in, and I am not a member of nor do I support any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

Local 1111, United Electrical, Radio and Machine Workers of America (UE)
United Electrical, Radio and Machine Workers of America (UE)
Signature: John J. Killian
Address: 1233 S. 17th Street
Milwaukee 4, Wisc."

"(Perforated)
"REC'D

receive the help of the National Labor Relations Board. An affidavit must be on file for each officer listed in your Constitution and Bylaws.

"WHERE TO FILE. — Local Labor Organizations must file this affidavit with the Regional Office of the National Labor Relations Board with which they usually file cases." It is without dispute that the Regional Office in question was located at Chicago, Illinois.

From October, 1952 to March 1, 1953, appellant was an officer of Local 1111, United Electrical Radio and Machine Workers of America (UE). This Union had a labor contract with Allen-Bradley Company of Milwaukee. On June 9, 1952, a special meeting of the officers of Local 1111 was held. The principal, if not the sole, business transacted at the meeting was the execution of noncommunist affidavits on the form previously described. As each officer signed his affidavit, it was notarized and then stacked on a desk with the affidavits previously notarized. The affidavits were then placed in an envelope and sent to the National Labor Relations Board. The stamp of the Board on the affidavits shows they were received at the Chicago office of the Labor Board on December 11, 1952, the second day after the signing. After the Board determined that all of the officers had executed affidavits, Local 1111 was notified that it had complied with the Act and could avail itself of the facilities of the Board.

Defendant's first argument is that the allegedly false statement was not made within the jurisdiction of a Government Agency. Section 1001 requires, as an element of the crime, that such statement be "made within the jurisdiction" of an Agency of the United States. We think this contention is entirely without merit. The affidavit came within the jurisdiction of the Board as soon as it was filed. The Board had the power to act upon it, and did, in fact, find Local 1111 to be in compliance under the Labor-

Management Relations Act because the affidavit of defendant and the affidavits of the other officers had been filed.

Defendant next argues that the Government did not prove that he knowingly filed the affidavit or caused it to be filed. Section 1001 is directed to the making of a false statement "in any matter within the jurisdiction of any department or agency of the United States." There is no requirement in that section as to the filing of an affidavit. However, in order to be within the jurisdiction of the National Labor Relations Board, Section 9(h) requires that such affidavit must be on file with the Board.

In response to a question on oral argument, defendant's counsel assured us that he was not contending that the Government must show that defendant, personally, filed the affidavit with the Board. However, he did insist there was no showing that defendant caused the affidavit to be filed. We do not agree. The defendant is a well-educated man. He knew the purpose of the special meeting was to have the affidavits executed. He is presumed to have read what he signed. Certainly, there is no evidence to the contrary. The instructions on the affidavit specifically stated that the affidavit had to be filed with the Board if any Union Local were to be entitled to receive the help of the Board. The affidavits were kept together and were placed in one envelope. They were promptly received by the Chicago office of the National Labor Relations Board. We hold there was sufficient proof that defendant caused the alleged false affidavit to be filed with the Board.

Defendant argues the Government failed to prove he was a member of the Communist Party or was in affiliation with the Communist Party on December 9, 1952, the date when he executed the affidavit. It is true, the record contains no evidence pin-pointing the membership or affiliation on December 9, 1952, but we do not think such proof was necessary to sustain the judgment of conviction.

The proof discloses defendant was a member of the Student Branch of the Dane County, Wisconsin, Communist Party as early as October, 1949. Meetings were held three or four times a month and defendant was a regular attendant. Some of the group meetings were held at his apartment. These meetings were open only to members of this Communist Party group, and a special procedure was used in order to gain admission. These meetings were screened by the playing of phonograph records to avoid suspicion. Defendant paid his dues to the Chairman of this group.

In November or December, 1949, defendant identified himself as a Section Organizer of the Communist Party. Defendant explained to Robert Sullivan that the Communist Party in Madison, Wisconsin, had been broken down into small groups for security purposes; that each group had particular assignments such as the National Association for the Advancement of Colored People, Young Progressives of America, and certain religious groups.

Defendant was the speaker at various Communist group meetings. At some of them he urged all present to purchase subscriptions to the Daily Worker and, on one occasion, solicited funds for the payment of a debt for Party literature. In the spring of 1951 defendant attended a meeting at the home of Jack Kling, the State Chairman of the Wisconsin Communist Party. Defendant attended other meetings where Kling spoke, including one at which Kling stated that those present must accept the fact that there never can be any permanent peace between capitalistic and socialistic countries. Kling pointed out this doctrine had been laid down at an International Conference of the Communist Party in 1927 and those present would have to accept it. Kling also stressed the importance of Communists gaining control of the labor movement in this country.

About the middle of November, 1951, a Communist Party group meeting was held at defendant's home. Defendant stated the purpose of the meeting was to form a cell of the Communist Party at the Allen-Bradley plant. Defendant informed Ondrejka who had joined the Communist Party at the request of the F.B.I. that it was of the utmost importance that they both become stewards in the plant in order to make a more effective Communist Party cell. Both did become stewards but, for security reasons, defendant and Ondrejka avoided each other at the stewards' meetings.

During February, 1953, a Communist Party meeting was held in defendant's home. Also present were Jerry Rose and Ted Silverstein, the South Side Section Leader and Youth Coordinator, respectively, of the Communist Party in Milwaukee. Rose praised the work that defendant and Ondrejka had been doing for the Communist Party at the Allen-Bradley plant, and stated that the time had arrived to coordinate activities under a new Communist Party Club. Rose suggested defendant be made Chairman of the Club because it would be easier for Rose and defendant to meet and discuss agenda. At this same meeting Silverstein discussed plans for the formation of a Labor Youth League at the Allen-Bradley plant.

Later, another Communist Party meeting was held at defendant's home. Again Rose and Silverstein were present and urged the immediate establishment of a Labor Youth League at the Allen-Bradley plant. It was decided at the meeting that this should be done.

In April, 1953, a meeting was held at defendant's house to discuss mailing to certain individuals of a special May Day edition of the Daily Worker. At defendant's suggestion it was agreed to mail a copy to each of the stewards at Allen-Bradley. A week later, a fund-raising meeting of the Communist Party was held at defendant's home.

The quota for the group was $100. Defendant pledged $35 upon behalf of himself and wife.

Defendant assigned himself as a member of the Legislative Committee of Local 1111, but vetoed Ondrejka's choice to be a member of the Welfare Committee. Defendant urged the importance of committee work in a Union, that by control of a Union's committee, the Party could control the Union without being officers of it. Defendant further explained how a single member of a committee could obtain control of that committee.

A meeting was held in defendant's home in May, 1953. Recruiting of members for the Communist Party was discussed. It was decided to send copies of the Daily Worker to "liberal" people at the Allen-Bradley plant. The names of those who appeared to be interested would be turned over to defendant and these would be considered fertile field from which the Communist Party could obtain future members.

Another meeting of the Allen-Bradley group was held in defendant's home in July, 1953. New security regulations were outlined. Members of the group were no longer to contact another member by telephone, the only contact to be through the Chairman. When calling the Chairman, the member was to keep on talking until the Chairman recognized his voice.

It is thus abundantly clear that the defendant was an enthusiastic and dedicated Communist both before and after December 9, 1952. There is nothing in the record to suggest that defendant had a change of heart before or after that date. About three months after December 9, 1952, defendant was the dominant figure in Communist group meetings which were held at his home. At the meeting held February 22, 1953, Jerry Rose, the South Side Section Leader of the Party stated "* * * During the

course of the past the Communist Party was very well pleased with the credible job that John Killian * * * (and Ondrejka) had been doing for the Communist Party." Also, Ondrejka testified he had known defendant to be a party member from April, 1951 to August, 1953.

We hold there is substantial evidence in this record from which the jury could properly conclude that defendant was a member of the Communist Party on December 9, 1952. This would cover the alleged false statement contained in Count 1 of the Indictment. As the sentences imposed were to run concurrently, and the longer sentence was imposed on the first count, the judgment of conviction herein can be sustained if the conviction on Count 1 is upheld.

Defendant claims the proof as to the falsity of his affidavit does not meet the requirements of the two-witness rule in perjury cases. *Weiler* v. *United States,* 323 U. S. 606. This so-called "two-witness rule" in perjury cases is not a constitutional requirement, but a rule of the ancient common law. We hold the two-witness rule in perjury cases is not applicable to prosecutions under 18 U. S. C. § 1001. Two other Circuits have reached the same conclusion. *Fisher* v. *United States of America,* 9 Cir., 231 F. 2d 99, 105; *Gold* v. *United States of America,* DC Cir., 237 F. 2d 764 (reversed on other grounds, 352 U. S. 985).

Defendant urges the trial court erred in refusing to order the production of FBI reports by witnesses Ondrejka, Sullivan and Fensholt. We do not find in the record any request by defendant for the production of such reports by Ondrejka[4] and Sullivan. Having failed to make such demand defendant cannot make claim the Court erred in not requiring that they be produced.

As to Fensholt's reports, a large discretion must be al-

4. There was a request for production of Ondrejka's expense receipts.

lowed the trial judge with respect to the production of documents and in the absence of abuse, the exercise of that discretion will not be upset. *Goldman* v. *United States,* 316 U. S. 129, 132; *d'Aquino* v. *United States,* 9 Cir., 192 F. 2d 338, 375, certiorari denied 343 U. S. 935; *United States* v. *Lightfoot,* 7 Cir., 228 F. 2d 861 (pending on certiorari). The area of discretion is especially broad where (as here) the documents sought are "part of the Government's file." *Goldman* v. *United States,* 316 U. S. 129, 132.

Defendant claims error because of the receipt of certain testimony and also that the Court erred in its instructions. Defendant also advances other arguments by reason of which he claims the judgment below should be reversed. We have carefully considered each of these claims. It would unduly extend this opinion to say more than we have determined that such claims are without merit and cannot be sustained.

The judgment of conviction is

AFFIRMED.

OPINION OF JANUARY 11, 1960.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit.

September Term and Session 1959

No. 12407.

THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN JOSEPH KILLIAN,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

January 11, 1960

Before DUFFY and CASTLE, *Circuit Judges*, and MERCER, *District Judge*.

MERCER, *District Judge*. This appeal is taken from a judgment entered upon a verdict finding the defendant guilty on each of two counts of an indictment charging him with having made false statements in an affidavit of non-Communist Union officer filed with the National Labor Relations Board, in violation of Title 18, U. S. C. § 1001.[1]

A prior judgment of his conviction of the same charge was first affirmed by us, *United States* v. *Killian*, 7 Cir., 246 F. 2d 77, but, upon rehearing, on authority of *Jencks*

1. Section 1001: Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

v. *United States*, 335 U. S. 657, we reversed the judgment because of the failure of the trial judge to require the government to produce for defendant's inspection statements made by certain government witnesses to the Federal Bureau of Investigation, *United States* v. *Killian*, *supra*, at page 82.

A second trial of the cause before a jury has resulted in a verdict and judgment of guilt on both counts. The latter judgment is now before us on review. Our task is largely simplified by reason of the fact of our prior opinion in this cause. While that fact does not lessen the burden of our duty to review the whole of the immediate record upon defendant's contention that the government has not sustained its burden of proof, we are convinced that several of defendant's contentions are controlled by our prior decision. We have reviewed the entire record and have compared the evidence adduced with our summary of relevant evidence in *United States* v. *Killian*, *supra* at 80-82. From that review and comparison we find that the relevant evidence adduced on the second trial is essentially a carbon copy of the evidence adduced at the defendant's first trial. We therefore conclude that we can, and must, follow our prior adjudication that the evidence was sufficient to support the jury's finding of the existence of every element necessary to proof of the crime charged. Accordingly, we adopt and follow our prior decision in the above respect and limit this opinion to a brief summary of the evidence tending to prove defendant's guilt as found by the jury.

On, prior to and after December 9, 1952 and December 11, 1952, defendant was an employee of the Allen-Bradley Company of Milwaukee, Wisconsin, and a member of Local 1111, United Electrical Radio and Machine Workers of America. From October 1952 to February 28, 1953, defendant served as an officer of Local 1111 by appointment

for the unexpired term of an officer who was then being replaced. The president of the Local notified all officers of that Union to come to the Union Office on December 9, 1952 to execute non-Communist affidavits. Defendant and all other officers came to the office on that date and each executed the requisite affidavits (NLRB Form No. 1081).[2] Defendant was given the affidavit form bearing his name, told to read the document, and then to sign the same, listing his present address. After all affidavits had been signed and notarized, they were mailed by the president or at his direction, to the National Labor Relations Board. Those affidavits were received by the Chicago Regional Office of the Labor Board on December 11, 1952. After receipt of the affidavit, the Chicago office notified Local 1111 that it had complied with Section 9 (h) of the Taft-Hartley Act. 29 U. S. C. A. § 159 (h).[3]

We agree with our prior opinion, 246 F. 2d at 80, that the jury could find that defendant wilfully and knowingly caused the affidavit executed by him to be filed with the Labor Board. In addition to the facts to which we there alluded that defendant is well-educated, that he knew the purpose of the special meeting of union officers called

2. For text of pertinent parts of affidavit, see 246 F. 2d at 79 and 80.

3. Section 9 (h). No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under sub-section (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period of each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliated or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

for December 9, 1952 and that defendant is presumed to have read what he signed, we add, only that defendant had been active in the labor movement and in the Communist Party for some years prior to the critical date and that he cannot be presumed to have been unaware of the purpose and necessity for the execution of such affidavits.

In disposing of the contention that the government failed to prove that defendant was a member of and affiliated with the Communist Party on December 11, 1952, we need do no more than refer to the able summary by Judge Duffy of the evidence relating to that issue, which evidence is, as we have observed, in all material respects identical to the evidence transcribed in the record before us. See 246 F. 2d 80-82.

Out of deference to the earnestness of defendant's advancement of that contention now, however, we will briefly summarize a part of the revelation of the present record concerning defendant's Communist Party membership and activities. As early as the fall of 1949 defendant was a member of the Communist Party group on the campus of the University of Wisconsin and in the city of Madison, Wisconsin. Meetings of the Party group were held at relatively regular intervals at which meetings Party aims and objectives were discussed and planned. A number of these meetings were held in defendant's home. Witness Sullivan testified that in October 1949 he transferred his Communist Party membership from Cincinnati, Ohio, to Madison, Wisconsin. He first identified himself to the Wisconsin State Chairman of the Communist Party who advised Sullivan that someone in Madison would contact him. Defendant made that contact and identified himself to Sullivan as Section Organizer of the Party in Madison. Defendant handled the chore of assigning Sullivan and others to the Party group or cell with which they were to

work. The testimony reveals a pattern of defendant's activity and leadership in Communist Party matters from late 1949 to the middle of November, 1951, when a Communist Party cell was formed to operate within the Allen-Bradley plant. Defendant suggested to the witness Ondrejka that both he and the defendant should become stewards of Local 1111 to enhance their opportunity for fostering Party aims within the Union. Both became stewards and participated in the stewards' meetings of the Local. In February 1953, defendant took an active part in the efforts of the Communist Party to establish a Labor Youth League Branch within the Allen-Bradley plant.

Ondrejka further testified that defendant discussed Party matters with him at the Allen-Bradley plant on several occasions in the fall of 1952, and that he, Ondrejka, personally knew defendant as a member of the Communist Party from the Spring of 1951 through August 1953. The record reveals a pattern of defendant's active participation in Communist Party meetings and affairs in, and subsequent to, the month of February, 1953.

There is substantial evidence from which the jury could find beyond all reasonable doubt that defendant was a member of the Communist Party when his non-Communist affidavit was signed and filed. To hold otherwise would deny all office to permissible inference and all value to circumstantial evidence as proof of state of mind on a particular day. The jury was certainly justified in inferring upon all of the evidence that defendant's membership and affiliation in and with the Party, which was so actively pursued for a long period of time to a time within a month or two of the date of December 11, 1952, and which was so actively continued beginning in February, 1953, was a continuing membership and affiliation which bridged the critical period without interruption. If that permissible inference is not enough to sustain the verdict the jury may

have believed Ondrejka's testimony that he, personally, knew defendant to have been a member of the Communist Party from 1951 through August 1953. This conclusion is consistent with our prior decision which we consider to be controlling upon this question. *United States* v. *Killian, supra.*

We come now to the principal issues of this appeal which relate to defendant's requests for the production of documents for use in the cross-examination of government witnesses, Fensholt, Sullivan and Ondrejka, upon whose testimony proof of defendant's Communist Party membership rests.

Witness Fensholt testified that he had joined the student group of the Communist Party in October 1949 when he was a student at the University of Wisconsin and that he had been an active member of the Party until August 1950, when he left the University; that he participated with defendant and others in Party meetings and activities during that period of time; and that subsequent to his leaving the University of Wisconsin he had related the facts of the Communist Party activities of himself, defendant and other members of the student group to an agent, or agents, of the FBI.

Sullivan and Ondrejka each testified that he had joined the Communist Party at the request of the FBI for the purpose of reporting to the FBI the identity and activities of Party members. Each testified that he had been paid by the FBI for his services. Each testified that he had made reports to the FBI during the period of his Party membership.

Each of the three witnesses had also testified before the grand jury which had found the indictment against defendant.

We have before us three principal issues, or three prongs

of the same principal issue relating to the court's rulings on defendant's demand for production. As to each of the three witnesses defendant demanded that all statements made by him to the FBI and the transcript of his testimony before the grand jury be produced by the government and delivered to defendant for his use in cross-examination of the respective witnesses. In addition, Sullivan and Ondrejka each testified on cross-examination that he had received compensation for services and reimbursement of expenses by cash disbursement from the FBI, from time to time. At the close of his cross-examination of Ondrejka, defendant demanded that all receipts for such cash payments be produced for his use in further cross-examination of the witness. No demand was made for the Sullivan receipts.

In each instance the court denied the motions for production of the grand jury transcripts. Defendant's demand for production of the receipts signed by Ondrejka was also denied. Upon the basis of his interpretation of Title 18 U. S. C. A. Sec. 3500,[4] the court entered an order requiring

4. Section 3500: (a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such

the government to produce and deliver to defendant all statements to the FBI which related to the subject matter of each of the witnesses' direct testimony. With respect to all statements, or parts thereof, which the government contended did not relate to a witness' direct testimony, the court further ordered that such statements be delivered to the court for an *in camera* determination whether the same ought to be delivered to defendant for his inspection and use.

The decisive principles to be applied in the determination of the correctness of the trial court's rulings differ as between each of the statements to the FBI, the receipts, and

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material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical or other recording or transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

the grand jury transcripts. We accordingly consider each of those questions separately and in the order listed above.

Defendant's demand for the FBI statements and reports was prefaced upon authority of the decision in *Jencks* v. *United States*, 353 U. S. 657. Thus, when defendant's demand for production was made during the course of the cross-examination of Fensholt and at the close of the direct examination of Sullivan and Ondrejka, defendant contended that he had an absolute right to have access to all statements and reports to the FBI made by the witness on the stand for such use as defendant might make of them on cross-examination. In taking that position, counsel for defendant admitted that the scope of his demand exceeded that provided by the so-called Jencks Act, 18 U. S. C. A. Sec. 3500.

The court construed Section 3500 as superseding the *Jencks* decision and ordered production of all statements and reports which related to the direct testimony of each witness for *in camera* inspection by the court. Such statements were then examined by the court and all matters were excised which the court determined to be not related to the direct testimony of the witness who had made the statement. The statements, as excised, were then delivered to defendant for his inspection and use. After the excision was completed the court impounded the statements, both the originals and a copy as excised, so that the same might be submitted to this court for its inspection.

Subsequent to trial of the case below and while the present appeal was pending the Supreme Court granted certiorari to review *United States* v. *Palermo*, 2 Cir., 258 F. 2d 397, and *United States* v. *Rosenburg*, 3 Cir., 257 F. 2d 762. We deferred consideration of the case until a decision had been made and rendered by the Supreme Court in the above cases. Those cases were decided June 22, 1959. *Palermo* v. *United States*, 360 U. S. 343; *Rosenburg*

v. *United States*, 360 U. S. 367; See also, *United States* v. *Lev*, 2 Cir., 258 F. 2d 9, aff'd, per curiam, 360 U. S. 470.

As a result of the *Palermo* and *Rosenburg* opinions defendant's position is somewhat altered, with his position now narrowed to the contention that the rulings of the trial court deprived defendant of rights accorded to him by Section 3500 as interpreted by the Supreme Court.

We have examined the record with care and conclude that defendant's contentions are without merit. Section 3500, not the *Jencks* decision, now controls the requirement and procedures for the government's production of the FBI reports and statements for a defendant's inspection in a Criminal case. *Palermo* v. *United States*, 360 U. S. 343; *Rosenburg* v. *United States*, 360 U. S. 367, 369. Statements of a witness for the government "made to an agent of the government which cannot be produced under the terms of 18 U. S. C. Sec. 3500 cannot be produced at all." *Palermo* v. *United States, supra* at 351. When prior statements of the witness are demanded, the government "will not produce documents clearly beyond the reach of the statute," and "when it is doubtful whether the production of a particular statement is compelled by the statute such statements must be submitted to the trial judge for an *in camera* determination." *Ibid*, at 354. Section 3500 limits "defense access to government papers" and is "designed to deny such access to those statements" which "do not relate to the subject matter of the witness' testimony." *Id.*

The procedure adopted by the trial court in the instant case could hardly be more faithful to that required by *Palermo* had the trial judge, through prescience and psychic perception, been able to foresee the result of that decision. In the face of the trial court's compliance with standards established by that controlling decision, each of defendant's contentions against the adopted procedure must be rejected. We are faced with no question as to producibility

of the statements involved—each satisfies the statutory criteria of being a statement signed or adopted by the witness, or a "substantially verbatim recital" of an oral statement of the witness and contemporaneously made. The questions before us are concerned with the relationship of the statements to the testimony of the witnesses.

Here, the court restricted production to statements relating to the direct testimony of each of the witnesses. Those rulings were proper and the only rulings permitted by the statute. The statute provides that no statement made by the government witness "shall be the subject of subpoena, discovery or inspection until said witness had testified on *direct examination* in the trial of the case." Subsection (a). After a government witness "has testified on *direct examination*" on a defendant's motion, the court shall "order the United States to produce any statement of the witness in the possession of the United States *which relates to the subject matter as to which the witness has testified.*" Subsection (b). (Emphasis supplied.) The meaning of the statutory language is clear. Congress intended that a defendant be not denied the opportunity to discredit the testimony of a government witness, and to that end has directed that statements given to the government by the witness must be made available to the defendant after the witness has testified on "direct examination," but only to the extent that such statements relate to the subject matter "as to which the witness has testified." Clearly, the intent is that such statements be used for impeachment purposes, and impeachment purposes only. As the court said in *Palermo, supra* at 349, Subsection (a) of the statute "manifests the general statutory aim to restrict the use of such statements to impeachment." The orders restricting production of statements to those relating to the direct testimony of the witness afforded to defendant his full measure of Section 3500 safeguards.

Defendant's second principal contention is, we believe, governed also by the *Palermo* opinion. Thus, defendant contends that the procedure adopted by the trial court permits the government in the first instance to make the determination as to what statements will be produced at all. The statute itself merely provides that the court shall order the production of any statements in possession of the United States which meet the statutory criteria. No protective procedure is established whereby a defendant or the court may determine what statements may exist, except the implied protection of the integrity of government counsel and agents. We do not find this deficiency, if any, shocking. Historically, in the course of litigation, both criminal and civil, much of the judicial machinery for discovery and inspection is geared to the personal and professional integrity of the bar. If for any reason there appears to be any doubt that materials which ought to have been produced under Section 3500 may have been withheld, the trial judge has the power to investigate any breakdown or failure of integrity. Cf. *Palermo* v. *United States, supra*, at 355. The court in *Palermo* was concerned with the question whether demanded documents were "statements" within the definition established by Subsection (e) of the statute, and not with the question here treated. We think, however, the standard established by that opinion is equally applicable to the question with which we are here concerned. In pertinent part, the court said:

> "The statute itself provides no procedure for making a determination whether a particular statement comes within the terms of (e) and thus may be produced if related to the subject matter of the witness' testimony. Ordinarily the defense demand will be only for those statements which satisfy the statutory limitations. Thus the Government will not produce documents clearly beyond the reach of the statute for to do so would not be responsive to the order of the court. However, when it is doubtful whether the production

> of a particular statement is compelled by the statute we approve the practice of having the Government submit the statement to the trial judge for an *in camera* determination. * * *.
>
> "It is also the function of the trial judge to decide, in light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement. In most cases the answer will be plain from the statement itself. In others, further information might be deemed relevant to assist the court's determination. This is a problem of the sound and fair administration of a criminal prosecution and its solution must be guided by the need * * * to avoid needless trial of collateral * * * issues while assuring the utmost fairness to a criminal defendant." *Palermo* v. *United States*, 360 U. S. at 354-355.

Here the government produced for the court's inspection a number of statements of each of the witnesses which related to his direct testimony even though that relationship was in many instances remote. Absent some indication that the government was remiss in this regard, and none appears of record, we think both the letter and the spirit of the statute are satisfied. Furthermore, defendant made no demand that the court interrogate the witnesses *in camera* or make other investigation as to whether all producible statements had been produced. On the contrary, defendant's demands were prefaced upon his asserted right to examine all reports, statements, and papers related to each witness without excision so that he might determine whether the same were useful to him. No such right exists. Section 3500 is designed to limit defense access to government papers and "it would indeed defeat this design to hold that the defense may see statements in order to argue whether it should be allowed to see them." *Palermo* v. *United States*, *supra* at 354.

Throughout the trial, defendant's demands for produc-

tion were based upon the same broad contention that he was entitled to a carte blanche production of all statements to the FBI made by a particular witness. That position was grounded upon the defendant's reliance on the *Jencks* case as establishing a rule of constitutional law. It is now clear, however, that the *Jencks* case prescribed only a rule of criminal procedure for federal courts which has now been superseded by enactment of Section 3500, *Palermo* v. *United States, supra* at 345, 347, 348, and that no constitutional questions are involved. *Palermo* v. *United States, supra* at 353, n. 11.

Defendant's arguments against the procedure here employed ignore the weight of competing interests which the statute seeks to reconcile. On the one hand, scrupulous fairness to a defendant in the administration of criminal justice is a matter of vital national concern. On the other hand, the security of the nation, which includes the inviolability of its investigative processes, is a legitimate interest of equal vitality.

The statute deals with this area in which these two competing interests collide by devising a compromise. Both the inviolability of statements to the FBI, desired by the national security interest, and the carte blanche inspection of such statements desired by defendants are required to give and take. On the one hand the government must produce all statements of its witnesses which fall within the statutory definition. On the other, a defendant has a right to demand statements only within the limitations fixed by the statute and is denied a litigant's usual participation in the determination as to what statements must be produced. The rights of a defendant are protected by the supervisory hand of the trial court, acting *in camera*, and by the right to submit his cause to an appropriate court for appellate review.

Inevitably, in a compromise imposed by statute there

is some unhappiness on the part of each party. The test of propriety of the court's rulings, however, is whether or not the court has followed the statute and has accorded to a defendant the rights to which he is entitled.

We have reviewed the original statements produced by the government for inspection by the court and as delivered to defendant after excision by the court. It appears that the government produced even statements having a remote relationship to the direct testimony of the witnesses. It also appears that the excisory hand of the court was liberally applied in favor of defendant and against the government. The procedure employed by the court was scrupulously fair. We therefore reject defendant's contentions against the rulings relative to production of statements given to the FBI.

The next contention of defendant is that the court should have ordered production of receipts given by Ondrejka to the FBI for salary payments and reimbursement of expenses. In the case of Sullivan, no request was made by the defendant for production of such documents and defendant cannot now complain that production was not ordered.

On cross-examination, Ondrejka testified that he had been paid $25.00 per month by the FBI from the time he joined the Communist Party until November 1949 and that his compensation was increased on the latter date to $50.00 per month. In addition, Ondrejka testified that he was reimbursed for all expenses incurred in conjunction with his FBI work. The witness further testified that he would, periodically, give an oral report of expenditures to an FBI agent and the agent would reimburse the witness at a later date. The court sustained an objection to the question whether the witness was required to sign receipts for reimbursements.

After cross-examination was completed, defendant moved to require the production for his inspection of all receipts signed by the witness. The government objected to the motion as one having no basis in statutory law or judicial opinion, but offered to furnish to defendant a schedule of payments for expenses and services which would show dates and amounts of payment. The defense refused to accept the tendered schedule and elected to stand on its motion, whereupon the court denied the motion for production.

We are convinced the court's ruling was proper under the circumstances of this case. The purpose of requiring the production of statements under Sec. 3500 is restricted to their use for impeachment of the witness. *Palermo* v. *United States*, 360 U.S. 343, 349. It is not conceived how defendant could have been placed in a better position by production of these receipts which would have shown only what the testimony had already revealed, namely, that the witness had operated as a paid FBI informant. In a broad sense, a receipt signed by a witness might be characterized as a statement given to the government within the statutory definition. We believe, however, that the demand for production of receipts is a matter within the sound discretion of the trial judge in his conduct of criminal trials. We do not believe the statute requires the court to explore every time-consuming, collateral alley which the defense can devise in a particular case and which bears no direct relationship to the witness' direct testimony. We think this is especially true, where, as here, the information contained in the receipts is established on cross-examination and the government has offered to supply the defendant, without objection and without delay, with a schedule of all information which the requested documents contained.

Fisher v. *United States*, 9 Cir., 231 F.2d 99, upon which

defendant relies, is factually inapposite to the instant case. In that case, two government witnesses were shown to have received in excess of $10,000.00 over a nine year period. One of the witnesses testified that he had received no compensation for his services as an FBI informer, but only reimbursement for his expenses. Under those circumstances, the court held that the failure to produce receipts was error because it related to the question whether the witness had been paid for his services. Here there is no attempt to conceal the witness' identity as a paid government informant.

Finally, on this phase of the case, we need to consider defendant's arguments that the court erred in refusing his request to inspect the transcripts of the grand jury testimony of the witnesses Fensholt, Sullivan and Ondrejka. In each instance, defendant contended, by analogy to the *Jencks* decision, that he had an absolute right to examine the grand jury transcript without the necessity for any foundation for such examination.

Defendant's reliance on the *Jencks*-decision analogy is misplaced. Neither the *Jencks* decision nor Section 3500 controls the production of grand jury testimony. *Pittsburgh Plate Glass Co.* v. *United States*, 360 U.S. 395, 398.

The *Pittsburgh* decision is squarely in point on this issue of the instant case. The defendants in Pittsburgh were convicted upon an indictment charging a conspiracy under Section 1 of the Sherman Act. One Jonas, called as a witness by the government, testified that he had been contacted by representatives of some of the defendants by phone and, later, had met with them and had discussed and reached an agreement on prices.

At the conclusion of Jonas' testimony, defense counsel established that Jonas had testified before the grand jury three times on "the same general subject matter." Counsel then moved for the delivery to defendants of the minutes

of his testimony before the grand jury. Counsel contended that the defendants had a right to inspect the grand jury transcript which related to the same general subject matter of the witness' direct testimony.[5]

In rejecting that contention the court held that the production of grand jury testimony is governed by Fed. Rules Crim. Proc. 6 (e) which is declaratory of existing judicial precedents, *Pittsburgh Plate Glass Co.* v. *United States, supra,* at 398-399, not by Section 3500 or the *Jencks* decision, *Ibid,* at 398. The basic policy relating to grand jury testimony is " 'a long established policy' of secrecy", *Ibid,* at 399, which may be relaxed only as the ends of justice require disclosure. *Ibid,* at 400; *United States* v. *Socony Vacuum Oil Co.,* 310 U.S. 150, 234; in re April 1956 Term Grand Jury, 7 Cir., 239 F.2d 263, 272. In a proper case, a court may order production of grand jury minutes for the use of the defense, *United States* v. *Procter & Gamble,* 356 U. S. 677, 683, but "The burden is on the defense to show that a particularized need exists for the minutes which outweighs the policy of secrecy." *Pittsburgh Plate Glass Co.* v. *United States, supra* at 400.

We have no showing here of "particularized need" for production, but only the broad claim of absolute right to access to the transcripts merely upon a showing that the witness has testified before the grand jury. The request for production was based upon a claimed right which does not exist. Denial of that request was not error.

We have reviewed the whole record in this case and find no merit in other contentions of error advanced by defendant. Particularized discussion of remaining ques-

5. Here, the defendant's demand was even broader in scope. Thus, the defense asserted an unrestricted right to examine the transcript of each witness' grand jury testimony, without regard to its relationship to the subject matter of the witness' trial testimony.

tions would only further lengthen an overly-long opinion. We find no error in the court's rulings upon admissibility of evidence or upon instructions. The court's charge to the jury was complete and accurate, and fair to both the defendant and the government. Finally, the error, if any, in the government's summation of the case is harmless error. We are not faced with a situation such as that in *United States* v. *Spangelet*, 2 Cir., 258 F.2d 338, in which counsel for the government made a direct reference to facts not supported by the evidence, and the court, in ruling upon an objection, gave to the jury the impression that defense counsel was being chastized.

The judgment is affirmed.

JUDGMENT.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

Monday, January 11, 1960.

Before

Hon. F. Ryan Duffy, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Frederick O. Mercer, District Judge.

United States of America,
Plaintiff-Appellee,

No. 12407 *vs.*

John Joseph Killian,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, in accordance with the opinion of this Court filed this day.

THE INSTRUCTIONS TO THE JURY.

1. The instruction on intent and scienter:

"You will note that the acts charged in the indictment are alleged to have been done 'knowingly' and 'willfully.' The word 'knowingly' means to act voluntarily and purposely and not because of a mistake or inadvertence or other innocent reason. The word 'willfully' means to act voluntarily and purposely and with the intent to do that which the law forbids (Tr. 675).

"A person is held to intend all the natural and probable consequences of acts knowingly done. The law assumes a person to intend all the consequences which one standing in like circumstances and possessing like knowledge should reasonably expect to result from any act which is knowingly done." (Tr. 674.)

2. The instruction on membership:

"Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those persons who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member.

"Intent is a state of mind and can only be determined by what an individual says and what he does. In determining the issue as to whether the defendant was or was not a member of the Communist Party at the time alleged in the indictment you may take into consideration the acts and statements of this defendant, as disclosed by the evidence, bearing in mind that individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the Communist Party are not in themselves con-

clusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in this case.

"In determining whether or not the defendant was a member of the Communist Party at the time alleged in the indictment you may take into consideration whether the defendant:

1. Paid dues or made any financial contributions to the Communist Party or collected any funds on its behalf;

2. Attended Communist Party meetings, classes, conferences, or any other type of Communist Party gathering;

3. Had made himself subject to the discipline of the Communist Party in any form whatsoever;

4. Participated in any recruiting activities on behalf of the Communist Party;

5. Has executed orders, plans or directives of any kind of the Communist Party;

6. Has acted as an agent, messenger, correspondent, organizer, or in any other capacity in behalf of the Communist Party;

7. Has been accepted to his knowledge as an officer or member of the Communist Party, or as one to be called upon for services by other officers or members of the Communist Party;

8. Has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the Communist Party;

9. Has spoken or in any other way communicated orders, directives, or plans of the Communist Party;

10. Has advised, counseled, or in any other way imparted information, suggestions, or recommendations, to officers or members of the Communist Party, or to anyone else, in behalf of the Communist Party;

11. Has indicated by word, action, conduct, writing, or in any other way, a willingness to carry out in any manner and to any degree the plans, objectives or designs of the Communist Party;

12. Has in any other way participated in the activities, planning or actions of the Communist Party.

"These are some of the indicia of Communist Party membership, but you are not limited solely to those I have enumerated. As sole arbiters of the facts, it is your duty to consider all the evidence, either direct or circumstantial, which bears upon the question of whether or not the defendant was a member of the Communist Party on the date alleged in the indictment." (Tr. 704-707.)

3. The Instruction on affiliation:

"The verb 'affiliated', as used in the Second Count of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

"A person may be found to be 'affiliated' with an organization, even though not a member when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis.

"Briefly stated, affiliation as charged in the Second Count of the indictment, means a relationship which is equivalent or equal to that of membership in all but name.

"Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you are to determine from all the evidence in the case. Affiliation or lack of affiliation in the Communist Party may be established by direct as well as circumstantial evidence.

"In determining the issue as to whether the defendant was or was not affiliated with the Communist Party at the time alleged in the indictment, you may take into consideration any statements made or acts done by the accused, and all other facts and circumstances in

evidence which may aid determination of the issue." (Tr. 679-680).

4. The Instruction on the Testimony of Paid Informers:

"Some of the government witnesses have been confidential informants of the Federal Bureau of Investigation. You are at liberty to consider this fact in connection with all other facts relating to such witnesses in determining the weight to be given their testimony. The fact that a witness was compensated by the Government, whether by way of reimbursement for time or expenses as a confidential informant, may be considered by you, along with all other facts and circumstances in determining the weight to be given to his testimony. However, you are at liberty to consider that such witnesses may be telling the truth, and if they have testified to the truth it is just as good as the truth from any other sources." (Tr. 690.)

Instructions Refused.

The trial court refused to give the following instructions requested by the defense:

"In order to find the defendant guilty of the offense charged in the first count of the indictment, you must find beyond a reasonable doubt that on December 11, 1952, the date of the filing of the non-communist affidavit, the defendant was a member of the communist party.

"Not every relation between an individual and an organization constitutes membership. Individuals may be sympathetic or agree with all or part of the program of an organization and cooperate actively with it and still not be a member. Isolated acts of an individual showing cooperation with the communist party or isolated statements of the defendant showing policies, if any be shown by the evidence, are not, standing alone, evidence of membership. Membership must be shown beyond a reasonable doubt to be meaningful and for an unlawful purpose.

"The communist party, like other voluntary organizations, sets forth conditions which a person must ac-

cept in order to become and remain a member. The burden is on the prosecution to prove beyond a reasonable doubt what the conditions for such membership were on the date in question, whether found in its constitution or elsewhere, and that the defendant accepted these conditions.

"Whether intermittent or repeated, the act or acts tending to prove membership and that both the defendant and the communist party intended such a relationship to exist on December 11, 1952, must be of that quality which indicates an adherence to or a furtherance of the illegal purposes or objectives of the communist party as distinguished from mere cooperation with it in lawful activities. The act or acts must evidence a working alliance to bring the illegal program to fruition. Unless there is evidence which convinces you beyond a reasonable doubt of some illegal purpose or objective of the communist party on December 11, 1952 and that the relationship between the defendant and the communist party on and after this date was a relationship based on the illegal purpose or objective, you must acquit the defendant on Count I of the indictment.

"The prosecution must prove beyond a reasonable doubt that on December 11, 1952, the defendant desired and intended and knew himself to be a member of the communist party and that the communist party considered him to be a member as I have defined it herein and knowing that fact filed and caused the affidavit to be filed on December 11, 1952 before you may find the defendant guilty of the offense charged in Count I of the indictment." (Tr. 606-608.)

"Witnesses Robert Sullivan and Michael John Ondrejka were employed as informants by the Federal Bureau of Investigation at all times testified to by them in this trial. For such employment they were paid. In view of the fact that they were employed, their testimony must be examined with greater scrutiny and care than the testimony of an ordinary witness for the purpose of determining whether such testimony was colored by their relationship with the Federal Bureau of Investigation or by the fact that they were paid for such employment." (Tr. 616.)

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 141

JOHN JOSEPH KILLIAN

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 37–55) is reported at 275 F. 2d 561. The prior opinion of the Court of Appeals (Pet. App. 28–36) is reported at 246 F. 2d 77.

JURISDICTION

The judgment of the Court of Appeals (Pet. App. 56) was entered on January 11, 1960. A petition for rehearing was denied on April 13, 1960. On May 4, 1960, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to June 12, 1960.

The petition was filed on June 11, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support a conviction for violation of 18 U.S.C. 1001, the "False Statements" statute.

2. Whether Section 9(h) of the Labor Management Relations Act (29 U.S.C. 159 (h)) and 18 U.S.C. 1001, as here applied, are constitutional.

3. Whether the court properly instructed the jury as to (a) membership in and affiliation with the Communist Party, (b) the terms "knowingly" and "willfully", as used in 18 U.S.C. 1001, and (c) the weight that might be given to the fact that a prosecution witness had been a paid informer.

4. Whether the Government's production of witnesses' statements complied with 18 U.S.C. 3500.

5. Whether the prosecutor's closing summation to the jury was prejudicial.

STATUTES INVOLVED

The statutes involved are 18 U.S.C. 1001, 29 U.S.C. 159(h), and 18 U.S.C. 3500. These appear at Pet. App. 25–27.

STATEMENT

Petitioner was charged, in a two-count indictment, with making a false statement in an affidavit of non-Communist Union Officer filed with the Regional Office of the National Labor Relations Board on December 11, 1952. Section 9(h) of the Labor Man-

agement Relations Act, 29 U.S.C. 159(h),[1] provided that the Board should make no investigation of a complaint by a labor organization unless each officer of the organization had on file with the Board an affidavit that he was not a member of, or affiliated with, the Communist Party. The statute makes the provisions of 18 U.S.C. 1001 (the "False Statements" Act) applicable to such affidavits.

An earlier conviction on the same charge was affirmed by the Court of Appeals, *United States* v. *Killian*, 246 F. 2d 77 (C.A. 7), but on rehearing that court reversed on the authority of *Jencks* v. *United States*, 353 U.S. 657. *United States* v. *Killian*, 246 F. 2d 77, 82. A second trial also resulted in a verdict of guilty on both counts, and the Court of Appeals again affirmed. *United States* v. *Killian*, 275 F. 2d 561 (C.A. 7). Petitioner was sentenced to five years' imprisonment on Count I and three years on Count II, the sentences to run concurrently.

Petitioner was a member of the executive board of Local 1111, United Electrical, Radio & Machine Workers of America. A special meeting of the officers of the Local was held on December 9, 1952, for the purpose of having the officers execute Union non-Communist affidavits together (Tr. 104, 120).[2] As each officer came into the office, he was given a copy of

[1] This section was repealed by 73 Stat. 519, approved September 14, 1959.

[2] On the face of the form, just below the title, appears the following, "See Instructions on the reverse side" (G. Ex. 1-L). These instructions provide information as to who must file and the procedure to be followed.

the affidavit, NLRB Form 1081, told to read it and then sign it and list his current address (Tr. 104, 116–117, 132).[3] As each officer signed his affidavit, it was notarized and placed in a stack with the affidavits which had previously been executed and notarized (Tr. 103, 118, 157). The completed affidavits were then placed in an envelope in the presence of, or under the direction of, the president of the Local and mailed to the National Labor Relations Board (Tr. 105, 119–120).

Upon receipt of the affidavits at the Chicago Regional Office of the National Labor Relations Board on December 11, 1952, the compliance officer checked them for completeness and to insure that each officer of the local union had executed an affidavit (Tr. 9, 12, 19–20, 25–26; G. Ex. 1–B, 1–U). Local 1111 was thereupon notified that it had complied with the Act and could avail itself of the facilities provided by the Board (Tr. 18–19; G. Ex. 1–A).

The Government's evidence as to petitioner's membership in the Communist Party covered the period 1949–53 and may be summarized briefly as follows:

Government witness Robert B. Fensholt testified that he became a member of the Communist Party while attending the University of Wisconsin (Tr. 159–161). He attended his first Party meeting in October or November 1949 (Tr. 164), when he was introduced to fellow members in the Party cell to which he had been assigned (Tr. 165). Among those

[3] "Tr" references are to the typewritten transcript filed with this Court.

Party members was petitioner, whom Fensholt had known previously (Tr. 165–166).

Petitioner was a member of the Student Branch of the Dane County Communist Party, a group composed of students on the University of Wisconsin campus, in October 1949 (Tr. 166–167). Meetings were held three or four times a month and petitioner regularly attended. Several meetings were held at petitioner's apartment (Tr. 166).

In late October 1949, Government witness Robert E. Sullivan, who had joined the Communist Party at the request of the Federal Bureau of Investigation (Tr. 368), transferred his Party membership from Cincinnati, Ohio, to Madison, Wisconsin (Tr. 305, 306–307). After identifying himself, by secretive means, to Andrew Remes, Wisconsin State Chairman of the Communist Party, Sullivan was told that he would be contacted by someone in Madison (Tr. 306–307). In December 1949, Sullivan received a note requesting him to contact petitioner, after which a meeting was arranged (Tr. 309). At this meeting, petitioner identified himself as the section organizer for the Party in Madison (Tr. 310).

Sullivan testified that at a Communist Party meeting held in Madison in 1950, at which petitioner was present, Remes stated, in answer to a question, that one could be a Party member without revealing his membership in an application for Federal employment because the Party could "impose security measures on him" (Tr. 317–322).

By January 1950, petitioner had attained such a position of prominence in the Communist Party that

he could reassign Sullivan and five or six of the older Party members to the downtown group (Tr. 326–327). He was sufficiently well informed about Party activities to tell Sullivan that Remes was going to be replaced as State Chairman for Wisconsin because of a desire on Remes' part to concentrate on industry (Tr. 327).

Government witness Michael J. Ondrejka testified that he joined the Communist Party at the request of the Federal Bureau of Investigation in October 1949 and that he remained a member of the Party until November 1953 (Tr. 408–409).

In the middle of November 1951, Ondrejka testified, a closed Party meeting was held at petitioner's house (Tr. 424–425). Petitioner stated that the purpose of the meeting was to form a Party cell at the Allen-Bradley plant. One of the purposes of the cell was to cultivate social contacts with workers of the plant in order to recruit them into the Party (Tr. 425–426). Petitioner told Ondrejka that it was important that they both become stewards in the shop (Tr. 427). Subsequently, both did become stewards in the shop and attended stewards' meetings together (Tr. 428–429). In the Fall of 1952, petitioner, while engaged in distributing political and union leaflets, would stop at Ondrejka's machine and discuss Party affairs (Tr. 430–431).

A Communist Party meeting was held at petitioner's home in February 1953, attended by Jerry Rose and Ted Silverstein, the South Side Section Leader and Youth Coordinator, respectively, of the

Communist Party of Milwaukee (Tr. 433–434). Rose said that the Party was well pleased with the work that petitioner and Ondrejka had been doing for the Party in the Allen-Bradley plant during the past several months (Tr. 435). He stated that there was a need to coordinate the activity of petitioner and Ondrejka, who had been working in an individual fashion, and that a new Allen-Bradley Party branch was to be formed to place them under tighter Party direction and guidance (Tr. 435). Rose suggested that petitioner be made chairman of the group because it would be easier for Rose to meet with petitioner and discuss the agenda (Tr. 435–436).

There was also evidence that petitioner, as a member of the Party, attended subsequent meetings in 1953 (Tr. 439, 447–454).

ARGUMENT

1. (a.) The evidence unquestionably warranted the jury's inference that petitioner was a member of the Communist Party on December 11, 1952, as well as on prior and subsequent dates.

There was evidence that petitioner about November of 1951 undertook to form a cell of the Communist Party at the Allen-Bradley plant, and proposed that he and Ondrejka become stewards in the plant in order to make the cell more effective (Tr. 424–428). In the Fall of 1952, he frequently stopped at Ondrejka's machine and then he would "discuss Communist Party affairs" (Tr. 430–431).

Petitioner's affidavit was filed on December 11, 1952. Shortly thereafter, in February 1953, a Party

meeting was held at his home, and attended by two officials of the Communist Party of Milwaukee. These officials praised the work which petitioner and Ondrejka had been doing at Allen-Bradley "during the past several months" (Tr. 435). Also, Ondrejka testified that he knew that petitioner was a Party member from April 1951 through August 1953 (Tr. 410–414).

On these facts, "the time element and other factors" made the inference of petitioner's membership on December 11, 1952, a compelling one. See *Maggio* v. *Zeitz*, 333 U.S. 56, 65; *Hupman* v. *United States*, 219 F. 2d 243, 248 (C.A. 6), certiorari denied, 349 U.S. 953.

(b.) Petitioner attacks the credibility of Ondrejka, "the single uncorroborated witness", apparently referring to the period 1952–1953. See Pet. 2, 12.[4] But the credibility of witnesses is peculiarly within the competence of the judge and jury who hear the witnesses and observe their demeanor. *Glasser* v. *United States*, 315 U.S. 60, 77.

In a case where the question is membership in an organization which operates covertly, testimony of informants is frequently a necessary part of the prosecutor's case and the use of such testimony is altogether proper. See *United States* v. *Dennis*, 183 F. 2d 201, 224–225 (C.A. 2), affirmed, 341 U.S. 494; *On Lee* v. *United States*, 343 U.S. 747, 756–758; *Caminetti* v. *United States*, 242 U.S. 470, 495–496.

[4] Petitioner does not now contend that the two-witness perjury rule is applicable.

The trial court explicitly instructed the jury that the fact that a witness had been a confidential and paid informant for the Federal Bureau of Investigation could be considered, together with all other facts, in determining the weight to be given his testimony (Pet. 60). Certainly, there was no need to phrase the cautionary instruction in words of petitioner's choosing.

(c.) The evidence establishes that petitioner's false affidavit was made in a matter "within the jurisdiction of [an] agency of the United States," and that the falsehood went to a "material" fact.

There is no dispute that petitioner was an officer of a local union and that under Section 9(h) a local could not avail itself of the facilities of the Labor Board unless all its officers filed "non-Communist" affidavits. Petitioner executed such an affidavit and it was filed. No reason has been suggested why he should execute such an affidavit, true or false, except to obtain for his union the advantages resulting from compliance with the requirements of the Act. In all events, the result of the filing of affidavits by petitioner and the other officers was that the Board's compliance officer made a check to determine that all of the officers had filed and that he then advised the Local that it was in compliance. Thereupon the Board was bound to allow petitioner's Local the use of the facilities of the Board, even if it should later determine that one or more of the affidavits filed was false. *Leedom* v. *International Union of Mine, Mill and Smelter Workers*, 352 U.S. 145; *Amalgamated*

Meat Cutters and Butcher Workmen v. *National Labor Relations Board*, 352 U.S. 153.

Since official action—making the facilities of the Board open and available to the Union—was induced, the offense was complete. It is immaterial whether the Union had occasion to avail itself thereafter of the opportunity which it assured to itself by complying with Section 9(h). "It does not lie with one knowingly making false statements with intent to mislead the officials of the Corporation [Board] to say that the statements were not influential * * *," *Kay* v. *United States*, 303 U.S. 1, 5–6. And see *United States* v. *Gilliland*, 312 U.S. 86, 93; *United States* v. *Leviton*, 193 F. 2d 848, 851 (C.A. 2), certiorari denied, 343 U.S. 946; *Weinstock* v. *United States*, 231 F. 2d 699, 701–702 (C.A.D.C.).

2. Petitioner's attack upon the court's charge to the jury (Pet. 14–16) is without substance.[5]

As to the terms "knowingly" and "willfully," the court instructed (Tr. 675);

> You will note that the acts charged in the indictment are alleged to have been done "knowingly" and "willfully". The word "knowingly" means to act voluntarily and purposely and not because of a mistake or inadvertence or other innocent reason. The word "willfully" means to act voluntarily and purposely and with the intent to do that which the law forbids.

In addition, the court charged that the "fundamental issue of fact" was whether the petitioner "knowingly and willfully used an affidavit which was false and which he knew to be false at that time" (Tr. 703).

[5] We have discussed above (p. 9) the cautionary instruction regarding informer testimony.

The jury was thus fully advised that the question was "whether the affiant acted in good faith or knowingly lied". This was a sufficient instruction as to the required "specific intent". *American Communications Assn.* v. *Douds*, 339 U.S. 382, 413.

The instructions as to membership were also proper. The court carefully explained that, in order to find petitioner guilty, the jury had to find that at the time alleged in the indictment the petitioner knew that the affidavit was false; and that he could not be convicted on the basis of *past* membership (or affiliation) (Tr. 703). Membership, the court charged, "connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member" (Tr. 704). The court then went on to describe twelve categories of evidence the jury might take into account in determining whether the petitioner intended to be a member of the Party, *e.g.*, evidence as to the payment of dues, attendance at meetings, subjection to Party discipline, acting on behalf of the Party and willingness to carry out Party plans (Tr. 705–706).

There is nothing in the charge inconsistent with the decision of this Court in *Galvan* v. *Press*, 347 U.S. 522, 528–529, with the concurring opinion of Mr. Justice Burton in *Jencks* v. *United States*, 353 U.S. 657, 678–679, or with the opinion in *Fisher* v. *United States*, 231 F. 2d 99, 107 (C.A. 9). The charge properly emphasized the essential fact that membership is a consensual matter.

As to "affiliation," the charge referred to "a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis" (Tr. 679). This also accords with the opinions in *Jencks*, and *Fisher*, *supra*.[6]

3. Petitioner's contentions as to the interpretation and application of 18 U.S.C. 3500 relate to two classes of documents: (1) the receipts given to the F.B.I. by Government witnesses Sullivan and Ondrejka for payments received; (2) statements by government witnesses relating to "policies, activities and program of the Communist Party" (Pet. 18-22).[7]

Sullivan and Ondrejka testified on cross-examination that they were paid by the F.B.I., and that receipts were given, or notes of the payments made by the agent (Tr. 370-376, 500-507). They also testified to the amounts they received. In addition, the government offered to submit to the defense a schedule of the payments made to Sullivan and Ondrejka, and the defense rejected the offer (Tr. 550-552). In these circumstances, petitioner can hardly claim that prejudice resulted from the fact that he did not see

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[6] Since concurrent sentences were imposed, petitioner of course must show that the instructions as to both membership and affiliation were defective. *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642.

[7] The petition raises no question as to the production of grand jury minutes, although the point was argued below.

the receipts themselves. Cf. *Rosenberg* v. *United States*, 360 U.S. 367, 370.

Petitioner's demand for all statements of Government witnesses relating to Communist activities was clearly too broad; Section 3500 calls for the production of statements which relate to the direct testimony of the witness. *Palermo* v. *United States*, 360 U.S. 343, 349. Both Sullivan and Ondrejka reported to the F.B.I. on matters not involving the petitioner (Tr. 376, 511), but what the petitioner demanded was *all* of their statements.[8]

4. Petitioner suggests (p. 10) that the summation of the prosecutor was improper in that the attorney gave what amounted to unsworn testimony.[9] The statement in question is obscure and petitioner does not even attempt to show how it could have influenced the jury in any way. Certainly it was not inflammatory. Cf. *Viereck* v. *United States*, 318 U.S. 236, 247–248. Moreover, the trial court carefully instructed the jury that the arguments and statements of counsel were not evidence (Tr. 681).

5. Petitioner also argues (pp. 16–17) that the court's charge left the membership question so vague as to permit a conviction on the basis of nothing

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[8] The Court of Appeals noted (Pet. App. 51) that the Government produced statements having only a remote relationship to the direct testimony, and that the trial court, in excising the statements, acted with liberality to petitioner.

[9] The statement (referring to Ondrejka) was: "He was married. The question was asked: 'You do not know what the answer is, and do not assume that you know.' We know. We talked about it out of your presence" (Tr. 665).

more than constitutionally protected speech or association, thus contravening the First Amendment. As we have already pointed out (*supra*, pp. 10–11), the court properly instructed the jury as to the required "specific intent." There is nothing in petitioner's contention that is not covered by the decision of this Court in *American Communications Assn.* v. *Douds*, 339 U.S. 382.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. [redacted] 7

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION.

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1. The Insufficiency of the Evidence of Petitioner's Communist Party Membership on December 11, 1952.

The government's recital of the evidence emphasizes that the case for the petitioner's Communist membership or affiliation on the single day, December 11, 1952, is bottomed upon an inference of continuing membership, drawn from evidence of membership before and after the sixteen months period surrounding that date. This case thus differs from *Hupman* v. *United States* (6 Cir., 1955), 219 F. 2d 243, which

involved "membership up to the critical date" and thereafter (219 F. 2d at page 248). As our petition sets forth, the inference of continuing membership over a sixteen months period denies the presumption of innocence and raises serious constitutional problems which should be resolved by this Court.

The few scraps of Ondrejka's testimony (admitted over objection) which the government cites do not bridge the sixteen months gap in the government's case. Ondrejka's conclusory testimony that he knew petitioner to be a Communist from 1951 through 1953 merely expresses the same improper inference of continuance in testimonial form. The conclusory testimony that petitioner discussed "Communist Party affairs" in the Fall of 1952 does not show Communist Party membership. It is as consistent with opposition to, or non-membership in the Communist Party as it is with membership or affiliation. The hearsay testimony of a statement by a third person that the Party was pleased with petitioner's work in the plant "during the past several months", was not adopted by the petitioner in any way (tr. 435). The hearsay declaration does not even support the inference that the Communist Party was "pleased" with petitioner's work because he was a Communist Party member. It is only by improperly mounting still another inference on that inference that petitioner's membership in the Communist Party on December 11, 1952 or any other particular date may be inferred. *United States* v. *Ross*, 92 U. S. 281.* Our petition seeks review of the question of whether or not the perjury rule of evidence is applicable in such a case (Question 1. b.), a question which is likewise presented for review in *Travis* v. *United States*, 363 U. S. 801. We believe that our argument (Pet., page 12), demonstrates from the very facts of this case that the practical

* The only evidence linking petitioner with the Communist Party after 1950 was Ondrejka's uncorroborated testimony.

considerations which have sustained the vitality of the rule in the face of scholastic criticism requires its application here.

2. The Insufficiency of the Evidence That the Alleged Misrepresentations Were Material or Within the Jurisdiction of An Agency of the United States.

The government's position that the allegedly false statements were material and within the jurisdiction of the National Labor Relations Board reemphasizes the conflict between the decision below and the rulings in *Jencks* v. *United States* (5 Cir., 1956), 226 F. 2d 540, *Rolland* v. *United States* (5 Cir., 1953), 200 F. 2d 678, and *Freidus* v. *United States* (D. C. Cir., 1955), 223 F. 2d 598. § 9(h) did not confer upon the Board the power to act as some kind of general loyalty clearance agency, taking loyalty oaths from union officers regardless of whether or not a proceeding is pending, and regardless of whether or not the union involved might come under the Board's jurisdiction. The jurisdiction of the Board is limited by the Act establishing it. And even when that jurisdiction is established, affidavits under § 9(h) are required and become material, only when an election petition is filed or a charge made of an unfair labor practice. The record here shows neither Board jurisdiction, nor materiality of the allegedly false statements.

The government's citation of *Kay* v. *United States*, 303 U. S. 1, 5-6, is not in point. The statute in that case did not require that the false statement be material.* In § 1001,

* The statute § 8 (a) of the Home Owners' Loan Act of 1933, 12 U. S. C. 1467 (a) (repealed June 25, 1948; see 18 U. S. C. § 1014) reads as follows:

> "Whoever makes any statement, knowing it to be false, or whoever willfully overvalues any security, for the purpose of influencing in any way the action of the Home Owners' Loan Corporation or the Board or an association upon any application, advance discount, purchase, or repurchase agreement, or

however, Congress deliberately limited the scope of criminality to material misstatements.

3. The Insufficiency of the Evidence That Petitioner Acted "Knowingly" or "Willfully."

The government does not attempt to rebut directly petitioner's argument that the mere fact of signing the affidavit is insufficient to prove that it was signed either knowingly or willfully, i.e. with the knowledge and intent that it would be filed with the Board to obtain the advantages of the Act. The government does not deny that there is a conflict between the decision below and the decision in *Jencks* v *United States* (5 Cir., 1955), 226 F. 2d 540. Instead of meeting these issues, the government endeavors to impart some flavor of conspiracy to the signing by describing it as taking place at the meeting of Local officers (opp. page 3). The record is clear that there was no "meeting" (tr. 118-119). The government's reference (opp. page 3, fn. 9) to the inscription on the face of the form, "See Instructions on the reverse side", likewise adds nothing to its case. The government's own witness testified that nome of the signers, including petitioner, read the reverse side (tr. 118).

The government's case boils down to the proposition asserted by the Court below. Actual knowledge and specific intent to cause the filing of a false affidavit are to be imputed to petitioner merely because he "was well educated" and "presumed" to have read the reverse side of the affidavit. The "presumption" established by the Court below, even if it were to be permissible certainly cannot withstand direct evidence that the petitioner did not read what he signed.

---

loan under this Act, or any extension thereof by renewal deferment, or action or otherwise, or the acceptance release, or substitution of security therefor, shall be punished by a fine of not more than $5,000.00 or by imprisonment for not more than two years or both."

The statutory requirement that the assertedly false statement be made knowingly and willfully does not apply merely to poorly educated men. It applies to all, including petitioner.

Petitioner did not have to prove his innocence. He is not obligated, as the government suggests (opp. page 9), to put forward a reason why he signed the affidavit. (As a matter of fact the record shows why he signed it. He was told to by his union president (tr. 113-117).) The government had the burden of proving petitioner's guilt of the statutory criminal elements of scienter and intent. It failed to meet this requirement.

4. The Instructions on Membership and Affiliation.

The government attempts to mininize the trial court's erroneous and unconstitutionally vague instructions as to membership and affiliation by treating them as independent of each other (opp. page 12, fn. 6). We submit that the two instructions must be considered together. The trial court's instructions, combined with its refusal to instruct that a guilty verdict could not be returned on both counts, so confused the two statuses and so intermingled the criteria for determining them, that the error in each definition permeated the other.

The government concedes *sub silentio* that the trial court's definition of membership omits the performance of the objective acts required for membership, a requirement laid down by *Fisher* v. *United States* (9 Cir., 1956), 231 F. 2d 99, and the concurring members of the Court in *Jencks* v. *United States*, 353 U. S. 657. It likewise concedes through silence that the definition of "affiliation" as given by the trial court did not follow that laid down in *Bridges* v. *Wixon*, 326 U. S. 135, and *Bryson* v. *United States* (9 Cir.,

1956), 238 F. 2d 657 (although such an instruction was requested).

Whatever support the government may hope to gain from the trial court's direction that membership or affiliation must be found to have existed on December 11, 1952 and that the affidavit did not relate to past membership is vitiated by the "indicia" which the trial court gave the jury to determine membership. There was no limitation by the judge as to remoteness in time of these indicia. What the court gave with one hand it took back with the other. It defined guilt as membership or affiliation on December 11, 1952, but it permitted membership to be rested upon evidence relating to times long past.

The eleventh of the "indicia" of membership which the court gave to the jury was whether the petitioner

> "Has indicated by word, action, conduct, writing or in any way, a willingness to carry out in any manner and *to any degree* the plans, objectives and designs of the Communist Party," (emphasis supplied).

It defies comprehension how any person, including the jurors, could be expected on the basis of this instruction to distinguish between membership in the Communist Party and affiliation with it when affiliation is merely defined as a "close working alliance or association" with the Communist Party. These instructions permitted the jury to find petitioner to have been both a member of, and affiliated with the Communist Party on evidence which would at most show occasional and constitutionally protected support of some of its activities.

5. The Instructions on Intent and Scienter.

The unconstitutional vagueness of the instructions as to membership and affiliation is not redeemed by the instructions as to intent and scienter. In the first place, as we have pointed out in our petition the trial court defined the statutory requirement that the asserted misstatement be made "knowingly and willfully" as merely requiring a general imputed intent based on constructed knowledge rather than a true specific intent based on actual knowledge. In the second place, since neither membership nor affiliation was properly defined by the instructions, even if the jury had been properly instructed as to scienter, it still need not have found that petitioner was a member of or affiliated to the Communist Party as those terms must be defined under the constitutional limitations of § 9 (h) as laid down by this Court in *American Communications Association* v. *Douds*, 339 U. S. 382.

6. The Refusal to Give Cautionary Instructions as to the Testimony of Paid Informers.

This Court in *On Lee* v. *United States*, 343 U. S. 747, recognized that the use of paid informers is a "dirty business" and may raise "serious questions" of credibility. The Court held that a defendant is entitled to have this issue of credibility submitted to the jury with careful instructions. See also, *Fisher* v. *United States*, (9 Cir., 1956), 231 F. 2d 99, *Fletcher* v. *United States*, (D. C. Cir., 1946), 158 F. 2d 321, *Cratty* v. *United States*, (D. C. Cir., 1947), 163 F. 2d 844.

Although this Court and other courts have recognized the inherently greater potentiality of falsehood in paid informer's testimony, the instructions gave no hint of this to the jury. If anything, the instructions clothed the

informer witnesses in a mantle of patriotic respectability as persons who merely accepted "reimbursement for time or expenses." Where the court should have given the jury guidance, it refused so to do. We do not contend that the court was required to adopt petitioner's phrasing of the instruction. We do contend that the jury should have been informed of the possibility that a serious question of credibility might be raised by the testimony of a paid informer, and that the trial court erred in refusing so to do.

7. The Questions Under 18 U. S. C. § 3500.

(a) The government's defense of its refusal to produce the actual statements of its witnesses, which included receipts for payment (opposition pp. 12-13), highlights the conflict between the decision in the Court of Appeals below and the opinion of this Court in *Gordon* v. *United States*, 344 U. S. 414. No contention is made that these were not "statements" under § 3500 (e). The question is therefore squarely put of whether or not this Court in *Rosenberg* v. *United States*, 360 U. S. 367, overruled *Gordon* and held that a reviewing court can now "rationally say that the excluding of evidence unknown to the record was • • • harmless." (*Gordon* v. *United States*, 344 U. S. at p. 420.)

The government assumes in its argument that a schedule of the dates and amounts of payment would give all the information contained in the withheld statements. We have no factual basis to agree or disagree with this assumption. Neither did the reviewing court. The ardor with which the demand for them was resisted suggests that the actual documents might have been helpful to the defense.

(b) The government's refusal to produce all the statements of the witness relating to the policies, activities and program of the Communist Party, even for *in camera inspection* by the trial judge, is another example of what the

Court of Appeals for the Second Circuit has correctly criticized as a

> "* * * reluctance of the prosecutor and the trial court to accept the policy of yielding pre-trial statements of prosecution witnesses to the defense for purposes of cross examination, as originally defined in *Jencks* v. *United States*, 353 U. S. 657 and later settled in the statute, 18 U. S. C. § 3500." *United States* v. *Tomaiola*, (2 Cir., 1960) F. 2d, (No. 219, October Term 1959, decided July 14, 1960, not yet officially reported).

As we have set forth in the petition (pp. 19-22) since the issue of the nature and quality of Communist Party membership was highly relevant to the prosecution's case, the trial judge should at the very least have ordered these statements produced for his own inspection and to permit review of their producibility upon appeal, and should not have abdicated his responsibility of making the initial decision upon producibility to the prosecution.

The Court has already indicated by the grant of writs of certiorari in *Campbell* v. *United States*, 362 U. S. 909, and *Clancy* v. *United States*, 363 U. S. 836, to review questions arising from the administration of § 3500, that it considers such problems important. It is respectfully submitted that the problems raised here are of equal or greater importance to the administration of the criminal law and merit full argument before the Court.

8. The Unsworn Testimony of the Prosecutor.

The unsworn testimony of the prosecutor was neither obscure, as the government contends (opp. p. 13), nor incapable of influencing the jury. In the context of this case this unsworn testimony was highly prejudicial.

The character and credibility of Ondrejka, who was the government's key witness, had been seriously impeached by

his admission on cross examination that during his whole courtship of his wife, and during the marriage in which she bore him three children, Ondrejka had been regularly reporting her activities to the F. B. I. for pay. In a last effort to rehabilitate this witness the prosecutor made the following statement of fact!

> "He was married. The question was asked: 'You do not know what the answer is, and do not assume that you know.' We know. We talked about it out of your presence."

There is no obscurity here. In this passage the prosecutor told the jury to disregard Ondrejka's betrayal of his wife, because he, the prosecutor, knew facts from discussions with the trial judge and defense counsel which negated this evidence as proving Ondrejka's bad character. The only obscurity here lies in the prosecutor's failure to reveal what these alleged facts actually were. That obscurity, combined with the prosecutor's authority, made the statement even more prejudicial. If the prosecutor had laid a fact before the jury it could have evaluated that fact with the other testimony. Here the jury could not even do that. The insinuations and assertions of personal knowledge by the prosecutor were bound to carry great weight against the accused when they should have carried none. *Berger* v. *United States,* 295 U. S. 78, 88. In this case they prevented full analysis by the jury of the credibility of a witness upon whose testimony the whole case of the prosecution rested.*

At the time the prosecutor's statement was made the defense objected and the trial judge overruled the objection (tr. 666). The jury could only interpret this as judicial

* The prosecutor's statement was not merely a statement of the prosecutor's personal knowledge. It was an even more prejudicial statement that the defendant's attorney had admitted privately that his arguments were invalid. Of course, no such statement was ever made by defense counsel.

approval of the prosecutor's unsworn testimony. The subsequent general instruction that arguments and statements of counsel were not evidence could not have removed this interpretation, *United States* v. *Toscano* (2 Cir., 1948), 166 F. 2d 524, 527.

CONCLUSION.

For the reasons set forth in the petition and in this reply, the petition herein should be granted.

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IN THE

Supreme Court of the United States

October Term, 1960

No. 127

JOHN JOSEPH KILLIAN,

—v.—

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

1. This Court's decision in *Travis* v. *United States* (No. 10, October Term, 1960) rested solely upon the finding that the indictment improperly laid the crime charged in the wrong venue. The decision thus leaves unresolved a number of important questions which the Court had brought before itself for resolution by its grant of a writ of certiorari, and which are likewise presented by the petition for a writ of certiorari in this case. These questions include,

> a. Whether the perjury rule of evidence is applicable to a prosecution for filing false affidavits under Section 9(h) of the Taft-Hartley Act.* (*Travis* petition, Question 1(a); *Killian* petition, Question 1(b).)
>
> b. Whether the requirement for conviction under Title 18 U. S. C. Section 1001 that the allegedly false

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* This Court also granted a writ of certiorari to review this question in *Gold* v. *United States*, 352 U. S. 819.

statement be material is satisfied, when petitioner's union did not make use of the machinery of the National Labor Relations Board while petitioner was an officer of the union. (*Travis* petition, Question 1(c). *Killian* petition; Question 1(d).)

c. Whether almost identical instructions to the jury defining membership in and affiliation to the Communist Party were erroneous and prejudicial. (*Travis* petition, Questions 2(a) and 2(b); *Killian* petition, Question 3.)**

2. The importance of these questions, the conflicts in the lower courts, and the conflicts with decisions of this Court with regard to these questions has been fully presented in the *Travis* and *Killian* petitions for writs of certiorari and will not be reargued here. We urge that the same considerations which warranted the grant of the writ in *Travis* are present in *Killian*, that the *Killian* presents squarely for resolution the same questions which this Court felt it worthwhile to resolve in *Travis*, and that this case is an appropriate vehicle for the resolution of those questions. Moreover, other important questions are presented to the Court by the petition here, including (among others), the refusal of the trial court to order production of documents, required to be produced under Title 18 U. S. C. Section 3500, cf. *Campbell* v. *United States*, 362 U. S. 909.

4. The *Travis* ruling, fixing venue at the district of filing emphasizes the government's failure to prove venue in this case. We do not conceive that an affidavit is only "filled" when it comes to its final resting place within a government agency. Delivery to the agency is sufficient. In this case, the government failed to meet its burden of proof that the affidavit was filed in the Northern District

** The instructions in *Killian* also conflict with the opinion of this Court in *Bridges* v. *Wixon*, 326 U. S. 135.

of Illinois, but simply proved that the affidavit came to rest in the files of the N. L. R. B. Chicago office. It may have been that the affidavit was delivered to a Board agent in Milwaukee. (In that case venue would lie in Wisconsin.) It may have been that the affidavit was mailed to Board in Washington and transmitted by them to Chicago. (In that case venue would be in Washington).

The burden did not lie upon defendant to disprove the allegations of the indictment. The burden lay upon the prosecution to prove the facts of filing which gave constitutional jurisdiction to try the proceedings in the Northern District of Illinois. It failed to meet this burden. In *United States* v. *Valenti* (C. A. 3 Cir.), 207 F. 2d 242, 244-245, similar proof was held insufficient to prove where the affidavit was filed.

CONCLUSION

For the reasons set forth in the petition, the reply, and this brief, the petition should be granted.

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No. 7

JOHN JOSEPH KILLIAN

vs.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITIONER'S SECOND SUPPLEMENTAL BRIEF.

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PETITIONER'S SECOND SUPPLEMENTAL BRIEF.

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1. The purpose of this brief is to place before the Court the impact of the opinions in *Campbell* v. *United States*, No. 53, October Term, 1960, upon questions 6 and 7 of the questions presented in the petition.

QUESTION 7.*

2. In the light of the *Campbell* decision, question 7 is re-formulated as follows:

> "The government presented the testimony of three witnesses concerning petitioner's participation in or

---

* Question 7 is formulated in the petition as follows:

"7. The government presented the testimony of three witnesses concerning petitioner's participation in or subscription to the program, activities and policies of the Communist Party. The purpose of this evidence was to show the special characteristics of

subscription to the program, activities and policies of the Communist Party. The purpose of this testimony was to prove the special characteristics of membership in the Communist Party as opposed to membership in other organizations. After demand was made for the witnesses' 'statements' under Title 18, U. S. C., Section 3500, the prosecution produced statements of the witnesses relating to the immediate incidents testified about on direct examination but did not produce other statements of these witnesses relating to the program, activities and policies of the Communist Party and its members. The question presented is whether the trial judge erred in ruling that neither he nor the defense might make any investigation behind the prosecution's initial determination as to what documents should be produced under Title 18, U. S. C., Section 3500."

3. The trial judge refused to make or permit any inquiry into the producibility of statements of prosecution witnesses which might have rebutted the prosecution theory that membership in the Communist Party was of such a nature that petitioner should be found to have retained his membership while filing the affidavit. Both the majority and concurring opinions in *Campbell* lay down a different rule than that applied by the trial court. As Mr. Justice Frankfurter, concurring, pointed out, unless it can be said from the record that the statements are "patently not producible", it is the duty of the trial judge to conduct an inquiry into their producibility. The major-

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membership in the Communist Party and the quality of the petitioner's alleged membership. The trial court refused to order the production of any prior statements of these witnesses relating to Communist Party program, activities and policies other than those reports relating to the immediate incidents testified to by the witnesses on direct examination. The question presented is whether the production of the witnesses' statements which relate to the program, activities and policies of the Communist Party was excused under Section 3500 (h) as being beyond the scope of the direct examination."

ity opinion stressed the affirmative duty of the trial judge under Section 3500 to administer the statute so as to secure relevant and available evidence upon which to base his decision as to producibility.

The statements in question here were not "patently not producible." They might well have been useful to the defense for impeachment both as to the witnesses' testimony crediting themselves as government informants of long standing, and as to the nature and quality of Communist Party membership. It was therefore the affirmative duty of the trial judge, once the possibility became apparent that these unproduced statements might be relevant to order their production before him for his determination under the statute.

4. The crux of the difference between this Court's attitude in *Campbell* and the rulings below is that the courts below treated the prosecution's initial determination as a final one. The trial court even forbade inquiry by the defense into the very existence of statements other than the ones produced. (Tr. 193, 194, 196, 200-205, 241-244, 253, 256, 261, 350-351, 489-491.) The Court of Appeals held that under Section 3500, "No protective procedure is established whereby a defendant or the court may determine what statements may exist except the implied protection of the integrity of government counsel and agents." The members of this Court, on the other hand, agreed in *Campbell* that it is the affirmative responsibility of the trial judge to make proper inquiry where a possible question concerning the legal significance of a document was raised in the record, even though the prosecution contended that the document was not producible. *A fortiori* it was error for the trial court to rule that the defense could not even question the prosecution's determination as to producibility.

5. The *Campbell* opinions stress that the responsibility for resolving disputed question as to the legal significance of a document rests with the court and it is the court that must pursue appropriate means for ascertaining the facts relevant to judgment. If defense counsel's demands were overbroad, the trial court's responsibility was not lessened thereby. Since defense counsel had not seen the statements, and was prevented from inquiring as to them, he could not formulate his requests with ritualistic precision. It was the trial court's duty to conduct an investigation *sua sponte* if such appeared to be required. It was not defense counsel's duty to fashion varied demands for particular forms of investigation, particularly where the rulings of the trial court had shown that any demand would be rejected.

QUESTION 6.*

6. The *Campbell* decision is instinct with the obligation of the trial judge to require the production of all the statements called for by Section 3500. So is every relevant decision of this Court. There is no question that the trial judge refused to order the production of statements which were required to be produced. Since it is not known what was in these statements, it cannot be argued that the refusal to order their production was harmless error. *Gordon* v. *United States*, 344 U. S. 414.

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* Question 6 reads as follows:

"Whether the production of statements which report payments to witnesses, as informers, is excused after a complete foundation for their production under 18 U. S. Code Section 3500 is laid, when all that the government has offered to produce at trial is a list of the amounts and dates of payments and there is no evidence as to what other facts are reported in these statements."

CONCLUSION.

For the reasons set forth in this supplemental brief and those previously presented to the Court, the petition should be granted.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

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UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MEMORANDUM FOR THE UNITED STATES IN ANSWER TO PETITIONER'S SECOND SUPPLEMENTAL BRIEF

Petitioner's Second Supplemental Brief, citing *Campbell* v. *United States,* No. 53, this Term, is based upon the same assumption as the petition: that, because Communism is involved in the case, the petitioner (defendant) was entitled under 18 U.S.C. 3500 to *all* reports the witnesses made to the Government relating to "policies, activities and program of the Communist Party" (Pet. 18-22, Brief in Opposition, p. 12). In other words, petitioner continues to assume that he was entitled to production of all reports to the F.B.I. made by the witnesses in regard to any Communist activity, whether or not the defendant or any of his activities were mentioned. This appears from the petitioner's citations (Second Supp. Br., p. 3) of transcript pages to support his statement that "the trial

court even forbade inquiry by the defense into the very existence of statements other than the ones produced." The fact is that petitioner's requests went far beyond the "subject matter" of the direct testimony.

Petitioner does not question the statement of the Court of Appeals, "* * * defendant made no demand that the court interrogate the witnesses *in camera,* or make other investigation as to whether all producible statements had been produced" (269 F. 2d at p. 569); and the record shows that he made no attempt to follow the procedure approved in *Palermo* v. *United States,* 360 U.S. 343, and in *Campbell.*

For the reasons stated above and in the brief in opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS
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BRIEF FOR RAYMOND DENNIS, *et al.*, *AMICI CURIAE*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

JOHN JOSEPH KILLIAN,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.
No. 7

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RAYMOND DENNIS, *et al.*, *AMICI CURIAE*

INTEREST OF *AMICI CURIAE*

Raymond Dennis and others, appearing as *amici curiae* herein with the consent of both petitioner and respondent, are the defendant-appellants in *Dennis* v. *United States*, Nos. 6451 to 6459 in the United States Court of Appeals for the Tenth Circuit. In that proceeding, the defendants were convicted of conspiracy to defraud the United States by causing false non-Communist affidavits to be filed with the National Labor Relations Board. The trial court's charge to the jury with respect to membership in and affiliation with the Communist Party was in part identical with the comparable portion of the charge in the present case, the propriety of which is one of the questions for review under the writ of certiorari. On appeal, the *Dennis* defendants have challenged the charge, and accordingly they have a direct and substantial interest in the disposition of that question by this Court.

STATEMENT

Dennis and his co-defendants are officers and employees of the International Union of Mine, Mill and Smelter Workers, the principal union in the nonferrous metals mining industry. In November, 1956 they were indicted in the United States District Court for the District of Colorado under the general federal conspiracy statute (18 U. S. C. 371), for conspiracy to defraud the United States in obtaining a compliance status under Section 9 (h) of the Labor Management Relations Act (29 U. S. C. 159 (h))[1] by filing and causing the filing of false non-Communist affidavits.

Following denial of a motion to dismiss the indictment[2] and trial to a jury, the nine defendants who were convicted took the appeal which is now pending in the Court of Appeals for the Tenth Circuit. One of the grounds of appeal is the trial court's charge with respect to the meaning of "member of" and "affiliated with", as these expressions are used to define the relationship with the Communist Party affected by the Labor Management Relations Act.

The relevant portion of the charge in the *Dennis* case is set forth in Appendix B (*infra,* pp. 30-32). Like the charge in the present case,[3] it incorporates most of the indicia of Communist Party membership in Section 5 of

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[1]Section 9 (h) was repealed by Section 201 (d) of the Labor-Management Reporting and Disclosure Act of 1959, P. L. 86-257, 73 Stat. 519.

[2]Defendants challenged the indictment on the ground, *inter alia,* that it failed to state an offense because the conspiracy charge involved no essential element of fraud. *Cf. Bridges* v. *United States,* 346 U. S. 209. The motion was denied, *United States* v. *Pezzatti,* 160 F. Supp. 787, and that ruling is also challenged on appeal.

[3]The charge in the present case is set forth in the petition for certiorari, at pp. 57-60.

the Communist Control Act of 1954, 50 U. S. C. 844.[4] Concededly, that statute envisages that juries shall consider these indicia (insofar as the evidence establishes the indicial facts) in determining issues of Communist Party membership or affiliation, but their use raises serious constitional questions under the First and Fifth Amendments.[5]

QUESTION PRESENTED HEREIN

This Court limited its grant of certiorari (365 U. S. 810) to two of the questions presented by the petition. This brief is concerned only with the first question, as follows:

> "Whether instructions to the jury properly defined membership in and affiliation to the Communist Party."

SUMMARY OF ARGUMENT

I. *Section 5 of the Communist Control Act of 1954 (50 U. S. C. 844), at least in part, is unconstitutional on its face.* The section provides (Appendix A, *infra* pp. 28-29) that evidence of any of the numerous actions by a defendant described therein shall constitute evidence of membership in the Communist Party. Accordingly, Section 5 falls within the long-established rule that statutes prescribing evidentiary rules of this type are valid under the due process clause only if there is reasonable basis for the statutory inference. *Tot* v. *United States,* 319 U. S. 463. The indicia of membership listed in Section 5 are too broadly

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[4]At the *Dennis* trial, the defense objected to the charge on membership and affiliation, including specifically the paragraph incorporating the Communist Control Act indicia.

[5]Such questions were presented in *Travis* v. *United States,* 364 U. S. 631, but the opinion and judgment of this Court did not reach them.

and vaguely worded to survive this test, and several of them —notably clauses (5), (6), (9), (11), (12) and (13)— embrace conduct which is patently unrelated to the determination of Communist Party membership. Section 5 also violates the First Amendment guarantees of free speech, press and assembly, for it subjects the exercise of these rights to the hazard of criminal prosecution and possible conviction under unreasonable and arbitrary evidentiary standards.

II. *Whether or not unconstitutional on its face, Section 5 of the Communist Control Act is unconstitutional as applied in this case.* The trial judge incorporated nine of the statutory indicia, virtually verbatim, in his charge to the jury on the ultimate issue of membership. These included clauses (5), (6), (11), (12), and (13) of Section 5, comprising the vaguest and most sweeping portions of the statute, remote from the ultimate issue of membership to be determined by the jury. Such a parroting of the statutory indicia in this case (and others where membership is an issue) is erroneous and highly prejudicial, and deprived petitioner of a fair trial. The omission of particular criteria, without comment on the corresponding lack of evidence, is likewise unfair, and an unconstitutional application of the statute resulted.

ARGUMENT

The ultimate issue of fact for the jury in this case was whether or not the defendant was a member of the Communist Party at the time he signed an affidavit to the contrary. The *Dennis* case presented the same issue.[6] In both

[6]Since the indictment in the *Dennis* case charges a conspiracy, the ultimate issue was whether or not the evidence established an agreement to file and cause the filing of false affidavits.

cases the trial judge, over objection, incorporated a large part[7] of Section 5 in his charge, to guide the jury in determining the ultimate question. In both cases the charge included portions of Section 5 which make it, in whole or in part, unconstitutional on its face. In neither case did the trial judge modify the language or confine the application of Section 5 in such a way as to avoid consequences both unfair and prejudicial to the accused.

I. IN WHOLE OR IN PART, SECTION 5 OF THE COMMUNIST CONTROL ACT OF 1954 IS UNCONSTITUTIONAL ON ITS FACE.

At least twice before, this Court has heard argument touching the constitutionality of Section 5 of the Communist Control Act. Most recently, the issue arose in the context of the registration provisions of the Internal Security Act of 1950 (50 U. S. C. 781 *et seq.*), in *Communist Party* v. *Subversive Activities Control Board*, —— U. S. —— (June 5, 1961). However, neither in that case nor the *Travis* case, *supra*, did the Court reach the problem, and in neither case was the nature and background of Section 5, as a statutory rule of evidence, fully explored.

A. *Legislative Background of Section 5.* This provision owes its origin to the dissatisfaction, entertained in certain quarters in 1954, with the practical results of the Smith Act (18 U. S. C. 2385) and the Internal Security Act of 1950. Under the former, the prosecution was obliged at each trial to offer voluminous and time-consuming evidence that the Communist Party is an organization that advocates

[7]Comparison of the two charges shows that in the *Dennis* case the trial court omitted the first two clauses of Section 5 and incorporated the other twelve verbatim, while in the present case the court omitted clauses (1), (9) and (10) of Section 5, modified clause (2) substantially and several others very slightly, and added a clause on recruiting which has no counterpart in Section 5.

overthrow of the government by force and violence. Under the latter, the Communist Party had not been finally determined to be a "Communist-action" organization, despite the elapse of four years since passage of the Act.

In the spring of 1954 a number of bills were introduced in Congress, the purpose of which was to make a legislative finding that the Communist Party is a violence-advocating organization, to "outlaw" it, and make knowing membership in the Party a criminal offense.[8] Some twenty such bills introduced in the House of Representatives were the subject of hearings conducted in the spring of 1954 by a subcommittee of the House Committee on the Judiciary.[9] Among these were H. R. 8912 (introduced by Representative Martin Dies of Texas) and H. R. 9502, each of which contained a section virtually identical with Section 5 of the Communist Control Act as ultimately enacted.[10]

At the hearings, Justice Michael A. Musmanno of the Supreme Court of Pennsylvania emerged as the draftsman of and principal witness for H. R. 8912.[11] Most of the

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[8]Sponsors of these bills were doubtful that such membership was punishable under the membership clause of the Smith Act, in view of the provisions of Section 4 (f) of the Internal Security Act. See footnote 9, *infra* and *cf. Scales* v. *United States*, —— U. S. —— (June 5, 1961).

[9]Hearings before Subcommittee No. 1 of the Committee on the Judiciary of the House of Representatives (83d Cong., 2nd sess.)—Serial No. 14 "Internal Security Legislation", hereinafter cited as "Hearings". The Chairman of the Subcommittee was Representative Louis E. Graham of Pennsylvania.

[10]H. R. 8912 and H. R. 9502 are set forth in Hearings, at pp. 169-70 and 211-12. Neither contained the phrase "or knowledge of the purpose or objective of such party or organization", and both contained a clause (15) defining the word "organization" which, in drastically modified form, finds counterpart in Section 4 (b) of the Communist Control Act, 50 U. S. C. 843 (b).

[11]Justice Musmanno made four appearances before the Subcommittee (Hearings, *passim*) and on two occasions in the House Representative the language of the bill was attributed to Justice Musmanno. 100 Cong. Rec. 14652 and 14849.

testimony and colloquy related to the legislative findings and the "outlawing" provisions, and there was scant reference to the portion (Section 4) of H. R. 8912 containing the language now in Section 5 of the Act. The general purpose to deal with cases of concealed membership is clear on the face of this provision, and Justice Musmanno's testimony adds nothing more.[12]

The Department of Justice, dubious of the constitutionality of the "legislative finding" of the Communist Party's unlawful nature and worried about the effect of the proposed legislation on enforcement of the Internal Security Act, opposed H. R. 8912 and the comparable bills.[13] Likewise critical was a member of the subcommittee, Representative Francis E. Walter of Pennsylvania, with whom Justice Musmanno was frequently involved in argument, which at one point touched on Section 4 of H. R. 8912.[14]

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[12]In a report submitted to the Committee May 24, 1954 (Hearings, pp. 123-31) Justice Musmanno commented on a number of the bills before the Subcommittee, and in particular on H. R. 8912 (Hearings, p. 131):

> "The only bill before this Committee which, in my judgment definitely, conclusively, and unequivocally puts the Communist Party of the United States out of business, and does it constitutionally, is H. R. 8912 . . .
>
> "The bill then specifically penalizes membership in these illegal organizations. Membership is not left to guesswork or conjecture. It is spelled out in such a manner that it blocks every possible subterfuge that a member of the party might present in the endeavor to conceal his membership."

[13]Hearings, *passim*.

[14]Hearings, p. 257:

> "Mr. Musmanno. If you . . . do not indicate what are the features of evidence which would be used to establish membership, all a member of the Communist Party needs to do is say, 'I resign,' and then you couldn't prosecute him because you must have some standards of evidence.
>
> "Mr. Walter. . . . you are just as wrong as you could be. When a man is indicted for being a member of the Communist Party on June 1, if he resigns the day it is filed, of course, he is guilty."

None of the bills considered by the Subcommittee was acted on in Congress, but much of the language of H. R. 8912 became part of the Communist Control Act by way of floor amendments to other legislation, as hereinafter described.

At this time, the Senate had under consideration S. 3706 (the "Butler" bill), containing those parts of the Communist Control Act which amended the Internal Security Act by adding the provisions relating to "Communist-infiltrated" organizations.[15] In the Senate, Senator Hubert Humphrey of Minnesota proposed an amendment in the nature of a substitute, containing provisions (a Congressional "finding" and a penal proscription of membership) very like those of Representative Dies' H. R. 8912, but *not* including the evidentiary "indicia" of membership. The sponsor of S. 3706, Senator Butler of Maryland, and other Senators influential in the field of internal security,[16] opposed the Humphrey amendment on the ground that it would jeopardize enforcement of the Smith and Internal Security Acts.[17] The Senate nevertheless adopted the Humphrey amendment, but as an addition to rather than a substitute

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[15]Section 10 of the Communist Control Act, which added to the Internal Security Act Section 13A. 50 U. S. C. 792a.

[16]Among others Senators William F. Knowland of California, William Jenner of Indiana and Joseph R. McCarthy of Wisconsin.

[17]100 Cong. Rec. 14211. Senator Butler also opposed the bill on the ground that "there is no way of knowing who is a member of the Communist Party." *Id.* at 14211. Apparently in consequence of this and other discussion of the difficulty of establishing membership, Senator Homer Ferguson offered an amendment to the Humphrey amendment providing that: "For the purposes of this act in determining whether or not a person is a member . . . the court may take into consideration the connection of such person with such organization as evidenced by his adherence to the discipline of the organization, his acceptance of the purposes of the organization and other incidents of affiliation with the organization with knowledge of such purposes." With Senator Humphrey's approval, the amendment was adopted by unanimous consent and without discussion. 100 Cong. Rec. 14230. This provision was eliminated by Representative Graham's amendment in the House. 100 Cong. Rec. 14639.

for the Butler bill, and in this form S. 3706 was passed and sent to the House, entitled the "Communist Control Act of 1954".[18]

In the House, S. 3706 was called up for debate with an amendment offered by Representative Graham which eliminated the criminal proscription of membership and substituted a provision (also derived from H. R. 8912) depriving the Communist Party of its "rights, *privileges and* immunities".[19] During the discussion, Representative Dies criticized the omission of both the proscription of membership and the evidentiary standards that had been part of H. R. 8912,[20] but the House passed the bill without further amendment and sent it back to the Senate.

There, Senator Humphrey moved to amend the bill by restoring the criminal proscription of Party membership, and adding a section (derived from Section 4 of H. R. 8912) embodying thirteen evidentiary standards of membership. Explaining the latter, Senator Humphrey declared:[21]

> "The purpose of the new section which I propose to add . . . is to establish certain criteria by which the

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[18]100 Cong. Rec. 14234.

[19]100 Cong. Rec. 14639. *Cf. Communist Party* v. *Catherwood*, —— U. S. —— (June 12, 1961).

[20]100 Cong. Rec. 14652: "Mr. Dies. Section 3 of the House bill [the "privileges and immunities" section] was taken from H. R. 8912, a bill which I introduced . . . and which was written largely by Justice Musmanno . . . Under my bill . . . you provide that anyone who becomes a member of the Communist Party would be guilty of a crime. You define 15 factual situations that constitute membership [referring to the "indicia" of membership language of H. R. 8912] . . . Those who put this bill together left out section 3 [the proscription of membership section] of my bill. They simply put in section 2 ["privileges and immunities"]. So while you are outlawing the Communist Party . . . yet the bill does not contain adequate enforcement provisions. I am hoping that when the conferees meet they will call Justice Musmanno before the committee and get him to help them write a more workable bill."

[21]100 Cong. Rec. 14722.

> court can hear evidence so as to determine effective membership, because obviously one of the most difficult jobs of the court and of the prosecutor is to determine what constitutes membership, and to be able really to pinpoint the fact of participating membership in the Communist conspiracy.
>
> "I have listed 14 criteria. I wish to make it clear that they are not exclusive. They are criteria, however, which the court shall instruct the jury to consider, in its deliberations upon the evidence, as being relevant to the ascertainment or establishment of membership."

There was sharp debate between the proponents of the Humphrey amendment and those who feared that the proscription of membership would interfere with registration proceedings under the Internal Security Act,[22] but no other significant comment on the evidentiary criteria.[23] The Humphrey amendment was approved by a vote of 41 to 39; in conference it was changed so as to subject Communist Party members to the disabilities of members of "Communist-action" organizations as defined in the Internal Security Act, and by adding the words "or knowledge of the purpose or objective of such party or organization" to the evidentiary criteria section,[24] and in that form was enacted into law as the Communist Control Act of 1954,[25] in which

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[22]100 Cong. Rec. 14211-12, 14222, and 14722-25.

[23]Speaking for the Humphrey amendment, Senator Clinton Anderson of New Mexico reported that "This morning I talked with Martin Dies . . . He says we must use the 15 tests he has outlined, and the Senator from Minnesota has therefore included them in his amendment to the bill." 100 Cong. Rec. 14724.

[24]100 Cong. Rec. 15101.

[25]The House had instructed its conference managers to agree to the changes made in the Senate. 100 Cong. Rec. 14849. Discussing the bill as amended by the Senate, Representative Dies said: "It defines membership by setting forth fifteen different factual situations that constitute membership." Representative Feighan of Ohio also referred to the provision as one "which defines membership . . ." 100 Cong. Rec. 14849.

Section 5 embodies the evidentiary criteria that had originated with Representative Dies and Justice Musmanno in H. R. 8912.

B. *Construction of Section 5.* From the foregoing account it appears that—

1) The general purpose of Section 5 is to facilitate the prosecution, under applicable statutes, of persons accused of membership in the Communist Party who deny their membership (or "participation" or "knowledge");

2) The specific purpose of the statute is to establish an evidentiary rule, that evidence of any of the facts and circumstances described in Section 5 shall constitute evidence of membership (or "participation" or "knowledge"); and

3) Congress did not consider or express the precise nature of the statutory inference or the manner by which it should be given effect, other than that it should be put to the jury "under instructions from the court", which of course would have been the case even in the absence of that phrase.

Section 5 is virtually *sui generis*. A reasonably thorough canvass of the laws of the fifty states has revealed no recognizable statutory antecedent.[26] Nor has its example proved

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[26] The survey was confined to legislation dealing with Communism and other forms of political subversion such as criminal syndicalism, loyalty, and the general field of internal security. Only three statutes were found which prescribe evidentiary indicia of membership or anything comparable. A 1958 Louisiana statute prohibiting the affiliation of certain non-trading corporations with foreign corporations "any of the officers or members of the board of directors of which are members of Communist . . . organizations" provides that: "Reports or information from the files of the Committee on un-American Activities of the U. S. House of Representatives shall constitute prima facie evidence of such membership in said organizations." La. Rev. Stat. (West's Supp. 1960) sec. 14:385. A 1952 Michigan statute prohibiting "communists" from holding certain state office provides that, in certain administrative proceedings, the ". . . refusal of any per-

attractive, for only one state has adopted such a law since Section 5 was enacted.[27] Indeed, the only closely related prior enactment in any jurisdiction[28] is the Union of South Africa's Suppression of Communism Act, 1950, which provides:[29]

> "12.(1) If in any prosecution under this Act, or in any civil proceedings arising from the application of the provisions of this Act, in which it is alleged that any person is or was a member or active supporter of any organization, it is proved that he attended any meeting of that organization, or has advocated, advised, defended or encouraged the promotion of its purposes, or has distributed or assisted in the distribution of or caused to be distributed any periodical or other publication or document issued by, on behalf of or at the instance of that organization, he shall be presumed, until the contrary is proved, to be or to have been a member or active supporter, as the case may be, of that organization."

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son . . . upon being called before a duly-authorized tribunal or in an investigation under authority of law, to testify concerning his being a Communist or a member of a Communist-front organization on the ground that his answers might tend to incriminate him, shall be . . . prima facie evidence that such a person is a Communist or a knowing member of a communist-front organization." Mich. Stats. Ann. (Callahan) Supp. 1959 sec. 28.243(18).

[27]The New Hampshire Subversive Activities Act (*cf. Uphaus* v. *Wyman*, 364 U. S. 388) was amended in 1955 by the addition of Section 3-a, identical with Section 5 of the Communist Control Act, except that it refers to members of a "subversive organization" or "foreign subversive organization" as defined in that Act. N. H. Rev. Stat. Ann. (1955) 588:3-a, added by Laws 1955, 188:1.

[28]Counsel's survey of foreign legislation is admittedly sketchy.

[29]Suppression of Communism Act, 1950 (Act No. 44 of 1950) Section 12.(1), as amended by Suppression of Communism Amendment Act, 1951. The latter statute deleted the word "publicly" before the word "advocated" in the text above. No decisions construing this provision were found. The Act declares the Communist Party to be an "unlawful organization", and empowers the Governor-General to declare any other Communist organization unlawful. Under the Unlawful Organizations Act, 1960, the Pan Africanist Congress and the African National Congress were temporarily declared to be unlawful organizations. *South Africa and the Rule of Law* (International Commission of Jurists, Geneva 1960), pp. 49-52 and 70-75.

There are, to be sure, a number of statutes directed at subversive organizations which extend the penal or other consequences beyond membership to supporting conduct of various types, some of which resemble some of the indicia in Section 5.[30] These, however, are not evidentiary provisions like Section 5, but rather are declarations of substantive law, based on acts such as attending meetings, paying dues or otherwise contributing financially, recruiting members, or distributing literature.[31]

In the evidentiary field, it is not uncommon for a legislature to lay down guides or standards to assist an administrative body in applying a more general "ultimate standard". There are several well-known federal examples,[32] including the Internal Security Act, Sections 13 (e) and (f) and 13A (e) of which contain an enumeration of factors to guide the Subversive Activities Control Board in determining whether or not an organization is "Communist-action", "Communist-front", or "Communist-infiltrated" in charac-

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[30]See, e.g., Miss. Code Ann. (1942), Sec. 4194-07; Okla. Stats. Ann. tit. 21, sec. 1266.4(4); N. J. Stats. Ann. sec. 2A: 148; Tex. Rev. Civ. Stats. Ann. (Vernon's 1960), art. 6889-3A; Iowa Code Ann. sec. 689.9; South Dakota Code (1939) sec. 13.0801; Mont. Rev. Code Ann. (1947) secs. 94-4406 and 94-4427.

[31]South Africa's Suppression of Communism Act, sec. 1. (1) (iii) goes even further in providing that its sanctions shall apply not only to anyone "who professes . . . to be a communist", but also to anyone "who, after having been given a reasonable opportunity of making such representations as he may consider necessary, is deemed by the Governor-General . . . to be a communist on the ground that he . . . advocated, advised, defended or encouraged the achievement of any of the objects of communism . . ."

[32]E.g. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126 (Fair Labor Standards Act of 1938); *Yakus* v. *United States*, 321 U. S. 414 (Office of Price Administration); *Mulford* v. *Smith*, 307 U. S. 38 (Agricultural Adjustment Act of 1938); *Hampton & Co.* v. *United States*, 276 U. S. 394 (tariffs).

ter.[33] But the criteria of Section 5 are not intended for use in drawing the boundaries of a statutory concept, but for the far different purpose of aiding a jury to determine a circumstance thought to be within the bounds of ordinary human observation—to wit "membership".

The most common type of legislatively-prescribed rule of evidence is that in which proof of a specified fact is made to give rise to an inference of another fact. While there are many variants, most of these statutes fall in one of two categories. In one, proof of possession of an article—commonly a weapon or a narcotic drug—raises an inference that the possession is criminal or unlawful.[34] In the other, proof of an act or "occurrence" raises an inference that the act was criminal or tortious.[35]

Only a few such statutes have been enacted in the loyalty-security field.[36] Nevertheless, it is clear that Section 5 of the

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[33]The standards in Section 13 (e) applicable to "Communist-action" organizations were upheld in *Communist Party* v. *Subversive Activities Control Board, supra.* Some of the standards in Sections 13 (f) and 13A (e)—notably item (3) in each—are much vaguer, and subject to the vices that afflict the criteria in Section 5 of the Communist Control Act.

[34]E.g. *Tot* v. *United States,* 319 U. S. 463 (possession of firearms by a convict or fugitive from justice raises presumption of transportation in interstate commerce); *Casey* v. *United States,* 276 U. S. 413 (possession of unstamped morphine raises presumption of criminality); *Adams* v. *New York,* 192 U. S. 585 (possession of policy slips raises presumption of knowing use for gambling).

[35]*Mobile, J. & K. C. R. R.* v. *Turnipseed,* 219 U. S. 35 (proof of injury inflicted by a railroad is prima facie evidence of railroad's negligence); *Manley* v. *Georgia,* 279 U. S. 1 (bank insolvencies presumed fraudulent); *Pollock* v. *Williams,* 322 U. S. 4 failure to complete work contract prima facie evidence of fraud); *McFarland v. American Sugar Co.,* 241 U. S. 79 (paying less for sugar in Louisiana than elsewhere presumptive evidence of monopoly); *Hawes* v. *Georgia,* 258 U. S. 1 (moonshining apparatus on premises).

[36]In addition to the statutes cited *supra* p. 11 note 26 see *Adler* v. *Board of Education,* 342 U. S. 485 (membership in "listed" organization with knowledge of unlawful purpose "prima facie evidence of disqualification" for teaching); Iowa Code Ann. sec. 689.6 (display of red flag is presumptive evidence of intent thereby to advocate anarchy or treason).

Communist Control Act—although it differs radically in other respects from these statutes—falls in the second category, inasmuch as evidence of any of the numerous acts or circumstances itemized therein is declared to be evidence of the ultimate fact of membership.

Among these evidentiary statutes, the legal nature and "weight" of the prescribed inference vary greatly.[37] Under some statutes the prescribed inference has "weight" only if uncontroverted, and vanishes as soon as contrary evidence is received.[38] Other statutes have been construed to give the inference evidentiary "weight" to be balanced against contrary evidence, and statutes of this type may[39] or may not[40] also shift the burden of proof to the defendant.

The language of Section 5 does not resemble that of other evidentiary statutes and, as already shown, Congress gave no consideration to these matters. Both the language and the purpose of the section make it quite clear, however, that the inference of membership, arising from evidence of the listed circumstances, has evidentiary weight which does not vanish in the face of contrary evidence, but which

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[37]Legislated evidentiary presumptions have been much discussed in legal literature. See, e.g., Wigmore, *Evidence* (3rd ed., 1940); secs. 1356 and 2491; Morgan, *Some Observations concerning Presumptions*, 44 Harv. L. Rev. 906 (1931); Morgan, *Instructing the Jury upon Presumptions and Burden of Proof*, 47 Harv L. Rev. 59 (1933); Comment 30 Mich. L. Rev. 600 (1932); 51 A. L. R. 1139.

[38]E. g. *Mobile, J. & K. C. R. R.* v. *Turnipseed*, 219 U. S. 35, 43; *Casey* v. *United States*, 276 U. S. 413. Wigmore (sec. 2491) does not recognize such statutes as creating "true" presumptions, and treats them as mere regulations of evidentiary procedure.

[39]*Western & Atlantic R. Co.* v. *Henderson*, 279 U. S. 639; *Manley* v. *Georgia*, 279 U. S. 1; *James-Dickinson Co.* v. *Harry*, 273 U. S. 119; *Hawes* v. *Georgia*, 258 U. S. 1

[40]E. g. *People* v. *Cannon*, 139 N. Y. 32, 34 N. E. 759 (1893).

persists and is to be weighed by the jury against whatever contrary evidence there may be.

The statutory directive that in determining membership "the jury . . . shall consider evidence, if presented, as to" the 13 listed indicia, strongly indicates that the criteria are to have lasting evidentiary weight. Nor is any other conclusion compatible with the law's purpose to deal with concealed membership,[41] for if the inference of membership were to disappear upon the introduction of contrary testimony, the indicia would then have no effect at a trial in which the defendant offers any evidence controverting the charge of membership.[42]

C. *Unconstitutionality of Section 5 under the Due Process Clause.* It is well-established[43] that a legislature cannot constitutionally enact a rule of evidentiary inference or presumption unless there is a rational relation between the fact proven and the fact inferred. In this Court, the rule was enunciated half a century ago by Mr. Justice Lurton, declaring for a unanimous bench in the *Turnipseed* case (219 U. S. at 43) that it is ". . . essential that there shall be some rational connection between the fact proved and the ultimate fact presumed, and that the inference of one fact from proof of another shall not be so unreasonable as to be a purely arbitrary mandate."

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[41] *Supra*, pp. 7-11 and notes 12 and 20.

[42] Senator Humphrey's statement (*supra* pp. 9-10) in the Senate, as sponsor of the amendment containing Section 5, also supports the conclusion that the indicia are to be given lasting evidentiary weight.

[43] Despite the contrary view of Dean Wigmore, *op. cit. supra* sec. 1356: "If the legislature can make a rule of evidence at all, it cannot be controlled by a judicial standard of rationality, any more than its economic fallacies can be invalidated by the judicial conceptions of economic truth." This appears to ignore the distinction between what is unwise or foolish, and what is irrational and arbitrary.

Variously phrased, this principle has been repeatedly stated and applied, and both state[44] and federal[45] statutes have been held invalid under the due process clause where the connection between the fact proved and the fact inferred was deemed insufficient.[46] Section 5 does not satisfy this test.

Evidentiary statutes heretofore reviewed in the courts have specified proof of a single element of the action (*e. g.* a railway accident, possession of a weapon, or a bank insolvency) as the basis for inferring an additional essential element. But Section 5 is wholly unlike these, for it specifies not one, nor 13, but at least 57 various acts and circumstances[47]—none of which is an essential element of the offense—as constituting evidence of the ultimate fact of membership. Furthermore, Section 5 places no temporal limit on the evidentiary inference it establishes; acts and circumstances described in these categories raise the inference of membership no matter how long before the indictment (or the time of the membership charged) they occurred.

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[44]*Western & Atlantic R. Co.* v. *Henderson*, 279 U. S. 639; *Manley* v. *Georgia*, 279 U. S. 1; *McFarland* v. *American Sugar Co.*, 241 U. S. 79; *Government of Virgin Islands* v. *Torres*, 161 F. Supp. 699 (D. V. I.); *Great Atlantic & Pacific Tea Co.* v. *Ervin*, 23 F. Supp. 70 (D. Minn.); *United States* v. *Warden of Clinton Prison*, 29 F. Supp. 486 (N. D. N. Y.); *In re Opinion of Justices*, 208 Mass. 619, 94 N. E. 1044 (1911).

[45]*Tot* v. *United States*, 319 U. S. 463; *Bollenbach* v. *United States*, 326 U. S. 607; see *Morrissette* v. *United States*, 342 U. S. 246, 275.

[46]It appears that the Court applies a stricter standard of rationality under statutes which, like Section 5, give the inference lasting evidentiary weight, than under those creating only an initial presumption which disappears when contrary evidence is introduced. Compare the *Turnipseed* case, *supra* (upholding the latter type) with the *Western & Atlantic* case, *supra* (invalidating the former type).

[47]The language of Section 5 is so diffuse and general that it is impossible to determine how many individual indicia of membership are comprised within the thirteen descriptive clauses, but tabulation on any basis will yield at least 57 varieties of inference.

Then, too, the components of the thirteen indicial clauses are made equally applicable to support the inferences of membership, participation, or knowledge of organizational purposes. Yet these three concepts are quite distinct each from the others, and there appears to be no rational basis for directing that three such different inferences be drawn from the same set of evidentiary criteria.

But the deeper vice of Section 5 lies in the lack of any reasonable connection between many of the items listed therein and the inference to be drawn therefrom. What basis is there for inferring that a person who has made a loan to the organization (clause (2)), perhaps secured by real estate, or who is "called upon for services" (clause (7)) which might even be legal or medical, is a member of the organization or knows its purposes? Even more remote from probability are clauses (9), (11), (12), and (13) of Section 5, all of which cover action taken independently of the organization, if such acts are in line with any of the "plans, designs, objectives, or purposes of the organization".[48]

The remote and irrational nature of these criteria was noted during the hearings on H. R. 8912 not only in the

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[48]It cannot be contended that the "plans, designs, objectives or purposes" of the organization covered by Section 5 are limited to the particular "purposes or objectives" to bring about overthrow of the government by force or violence as specified in Section 4 of the Act. Section 5 is clearly intended to be comprehensive and general, as witness the phrases "orders, plans, or directives of any kind of the organization" in clause (4) and "any plan or enterprise of the organization" in clause (6). Furthermore, if such a limiting construction were to be placed on Section 5 the judgment here would have to be reversed, inasmuch as no such restriction was expressed in the charge to the jury. Note also the result such a limiting construction would have under the phrase "if presented" in the introductory paragraph of Section 5.

press[49] but also by Representative Francis E. Walter, a member of the subcommittee[50]:

> "Mr. Walter. Here is the thing that disturbs all of us as former practitioners. Look at this language . . . of the bill that you are discussing. . .
> " 'Has made financial contribution to the organization in dues, assessments, loans, or in any other form'—
> "then followed by this—
> " 'Has made himself subject to the discipline of the organization in any form whatsoever.'
> "I am quite certain you will agree with me that those two provisions are susceptible of very strange interpretation. If I should make a contribution to the Anti-Nazi League that would make me guilty under the terms of this law. Or if I should advocate public housing—which is the Communist Party line at this moment—that would make me guilty under this bill. The guilt is not related to the fact that the group is trying to overthrow the government of the United States, but only to the activities I have enumerated.
> "Mr. Hyde. They are not only advocating public housing but graduated income tax.
> "Mr. Walter. You will find that lawyers just do not quite agree that that is the proper approach . . ."

The defects noted by the Congressman are patent on the face of Section 5. It is common knowledge that the Communist Party not only advocates public housing but

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[49]100 Cong. Rec. 15110-11. *The Wall Street Journal* said: "One of these provisions is that it would be evidence of cooperation with the Communist groups if any person has indicated a willingness to carry out aims and purposes of the party. For all we know the Communist Party may be against juvenile delinquency. So is this newspaper." The *Newark Star Ledger* said: "Such a law might be used to herd into prison thousands of persons who have never been Communists and who have no basic sympathy with the Communist conspiracy."

[50]Hearings at p. 183, during the testimony of Wayne E. Richards, Commander-in-Chief of the Veterans of Foreign Wars.

also racial integration, the Stockholm peace appeal, and numerous social aims many of which are supported by people who are strongly anti-Communist. Yet under these clauses of Section 5, it is evidence of Communist Party membership to write, speak, or act in any other way in favor of these goals, if they are also goals of the Party.

Finally, and in addition to their remoteness from the fact inferred, the criteria of Section 5 are cast in such vague and general terms that they cannot be fairly used by jurors as guides. Other evidentiary statutes designate with precision the proven fact from which the inference is to be drawn. Section 5, however, directs that the inference of membership may be drawn not only from the particulars specified therein, but also from any fact or circumstance reached by catch-all expressions—"any other form" of financial contribution (2), discipline "in any form whatsoever" (3), directives "of any kind" (4), "in any other capacity" (5), "any plan or enterprise" (6), "any other form of communication" (8), "any other type of publication" (9), "in any other way" sent "material or propaganda of any kind" (10), "or to any one else" (11), "in any other way" and "in any manner and to any degree" (12), and "in any other way participated" (13). Obviously, there can be no rational basis for inferring membership from unspecified facts.

For all these reasons, Section 5 "offends reason" and cannot be regarded as "a fair summary of experience". See *Bollenbach* v. *United States*, 326 U. S. 607, 611. It is far more arbitrary and unreasonable than the statutes invalidated in the *Tot, Western & Atlantic, Manley, McFarland,* and other such cases, all *supra* pp. 16-17. As Justice Jackson wrote for the Court in *Morissette* v. *United States*, 342 U. S. 246, 275:

> "A presumption which would permit but not require the jury to assume intent from an isolated fact would

> prejudge a conclusion which the jury should reach of its own volition. A presumption which would permit the jury to make an assumption which all the evidence considered together does not logically establish would give to a proven fact an artificial and fictional effect . . . Even Congressional power to facilitate convictions by substituting presumptions for proof is not without limit. *Tot* v. *United States,* 319 U. S. 463."

In the case of Section 5, and in their zeal to ferret out "every possible subterfuge",[51] Representative Dies and Justice Musmanno lost touch with reality and framed an evidentiary statute which, on its face, is incompatible with due process of law.

D. *Unconstitutionality of Section 5 under the First Amendment.* Evidentiary statutes relating to railway accidents, firearms, and bank insolvencies may or may not be unreasonable in terms of due process, but do not infringe on the First Amendment. Section 5, however, embodies standards which violate not only that clause, but the First Amendment as well. Their impact on freedom of speech, press and assembly is direct, for clauses (6), (8), (9), (10), (11), and (12) expressly deal with conferring, communicating, meeting, writing, speaking and disseminating literature.

In *De Jonge* v. *Oregon,* 299 U. S. 353, is was held that lawful exercise of the First Amendment freedoms may not constitutionally be penalized merely because the auspices are those of a subversive organization. *A fortiori* Section 5 is invalid, for it reaches not only speech or writing under the auspices of the Communist Party, but also any speech or other conduct which supports an objective also favored by the Party. Thus it embraces mere parallelism, and applies

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[51] *Supra,* p. 7.

even if there is no contact between the Party and an accused person acting entirely independently, or even competitively.

It is no answer to say that Section 5 is not a penal statute, or that the criteria it embodies are not absolute tests. The inescapable fact is that it directs judges to instruct juries that speech or writing, uttered or distributed quite independently of the Communist Party (or other organization), shall be considered as evidence of membership in the organization if it is "in behalf of the objectives" of the organization. The statutory mandate is hopelessly vague and unreasonable, and its acceptance as a standard of proof would be gravely detrimental to our judicial practice.

II. WHETHER OR NOT UNCONSTITUTIONAL ON ITS FACE, SECTION 5 OF THE COMMUNIST CONTROL ACT IS UNCONSTITUTIONAL AS APPLIED IN THIS CASE.

Irrespective of the constitutional validity of Section 5 on its face, it has not been constitutionally applied in either the present case or the *Dennis* case. Assuming that constitutionality can somehow be salvaged, this could only be accomplished by a very flexible construction of the statute, and careful framing of the court's instructions to the jury insofar as they relate to the evidentiary indicia of membership.

Supporting the constitutionality of Section 5 in *Communist Party* v. *Subversive Activities Control Board, supra*, the government referred[52] to the provision that the jury's consideration of the evidence described in Section 5 should be "under instructions from the court", and then remarked: "It is to be presumed that the court's guidance of the jury in its consideration of said evidence will be an intelligent guidance." But experience to date has not borne out the

[52]Brief for the Respondent in No. 12 (October Term, 1960) p. 167.

government's presumption, for the federal district courts have tended rather to apply Section 5 in a rigid fashion, reading its provisions very literally and embodying its language parrot-like in their instructions to juries.[53] As in the present case, the trial courts have simply eliminated those clauses of Section 5 to which no evidence in the record corresponded (relying, no doubt, on the phrase "if present" in Section 5), and have incorporated the remaining clauses, regardless of the nature of the evidence, in the charge virtually verbatim. Such practice inevitably results in an unconstitutional application of Section 5.

A. *Consequences of Lack of Evidence.* In practice, the effect of Section 5 is that the trial judge directs the jury's attention to evidence falling within the statutory ambit, and informs them that they may draw from it the inference of membership (or participation or knowledge). The phrase "if presented" in the introductory paragraph indicates that if no evidence falling within one or more of the thirteen categories is recorded, then there is no evidence of that sort to call to the jury's attention, and that or those particular categories should not be referred to in the charge.

The trial judge in the present case (and the *Dennis* and *Travis* cases) gave effect to the phrase "if presented" by simply omitting the clause or clauses to which, in his view, no evidence corresponded.[54] But this practice is grossly unfair to the accused, for the result is that evidence thought to support an inference of membership is emphasized to the jury, while a lack of evidence of significant aspects of

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[53] In addition to the charge in the present case and the *Dennis* case, see the charge in the *Travis* case, 269 F. 2d 928, at 941-42.

[54] In the *Travis* and *Dennis* cases the trial judge omitted clauses (1) and (2) from the charge. In the present case he omitted clauses (1), (9) and (10) and added a clause of his own on recruiting—a treatment which only worsened the basic unfairness of underlining the prosecution's evidence and ignoring the gaps therein.

membership—for example, payment of dues—is not even called to its attention, even though such a failure of proof may be quite as (or more) significant on the negative side of the issue as the evidence presented may be on the affirmative side.

Obviously the problem cannot be dealt with simply by including all the Section 5 clauses in the charge regardless of the presence or absence of evidence to fit them. Such a solution would violate the statute's specific language ("if presented"), and would make a bad matter worse, by confusing the jury and suggesting the presence of evidence in categories where in fact there is none.

Accordingly if, as Section 5 envisages, special emphasis is to be given to certain categories of evidence presented against the defendant, fairness requires that comparable emphasis be given to significant gaps in the evidence. If the judge may conclude that evidence has been presented showing that X has spoken in favor of one of the Party's objectives, and may instruct the jury to consider this as evidence of X's membership, then elementary fairness requires that the judge also call to the jury's attention that there is a complete failure of evidence that X has ever paid dues or been listed as a Party member. But none of the district courts have so framed their instructions, and this failure has resulted in the unconstitutional application of Section 5.

B. *Treatment of Remote Evidence.* A far more difficult problem arises in connection with evidence presented by the prosecution which falls within the broad language of one or more of the Section 5 clauses, but the fact is so remote that it cannot reasonably support an inference of membership, or even that it should not be received in evidence at all. Only by disregarding the categorical language of the statute ("the jury . . . shall consider evidence") and giving

broad and discretionary scope to the judge's role ("under instructions from the court") might Section 5 be constitutionally applied.

For if the statute is applied automatically and in accordance with its sweeping language, then much "evidence" would not only be admissible but also sufficient to support the inference of membership, which actually has no probative value and is hopelessly remote from the issue, temporally or logically or both. If this is done, then indeed the apprehensions expressed prior to the act's passage by the Congressmen and journalists quoted above[55] will prove well-founded, and there will be danger of convictions on charges of membership on the most flimsy and remote evidentiary foundations.

Therefore the trial court must rule on evidence offered by the prosecution with due regard to the principle that it should be received only if reasonably probative on the issue of membership. In his charge to the jury, he should make reference to a particular clause of Section 5 only if there is corresponding evidence of sufficient weight to support the inference of membership. Failure to do this, and automatic incorporation of these criteria, will inevitably suggest to the jury that they are invited to find membership on almost any basis. Such an impression cannot be corrected by other parts of the charge, impeccable though they may be.

The charge in the present case plainly fails to meet these requirements. Apart from the changes noted above, it is virtually a "true copy" of Section 5.

C. *Treatment of "Catch-all" Phrases.* Regardless of the nature of the evidence received in any particular case, the indicial clauses of Section 5 should under no circumstances be embodied verbatim in the charge. For these

[55] *Supra*, p. 19.

clauses contain sweeping "catch all" phrases (recapitulated *supra*, p. 20) which are wholly unsuitable for use in charging a jury.

The contents of clause (8) may serve as an example. If it be assumed that evidence is received indicating that the defendant has "communicated" a "directive" of the Communist Party by "semaphore" (unlikely as that may be), and if it be further assumed that the nature of the "directive" and the attendant circumstances are such that an inference of membership might reasonably be drawn, then the trial judge might, in accordance with the statute, call this evidence to the jury's attention and tell them that it might be considered in determining the issue of membership.

But neither on such a record nor any other would there be any justification for incorporating clause (8) in the charge verbatim, for clause (8) covers not only "signal, semaphore, sign" but also "any other form of communication". What evidence does such a phrase denote, and what would be inferred from such an unspecified communication? Plainly it is too vague (like the other catch-all expressions in the other clauses) for any meaningful or proper use in jury instructions.

Accordingly, such sweeping phrases should be eliminated from the charge, regardless of which clause is drawn upon, and regardless of the particular record. In no reported case, however, has this been done. In the present case, the minor discrepancies between the language of Section 5, and of the comparable portions of the charge, were minor and insignificant,[56] and did nothing to prevent the unconstitutional application of Section 5.

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[56]E.g. The word "courier" was omitted from clause (5) and the words "signal, semaphore, sign" from clause (8) of Section 5, as these appeared in clauses (6) and (9) of the charge. All the "catch-all" expressions, however, were retained in the charge.

CONCLUSION

For all the foregoing reasons, the *amici curiae* respectfully join in petitioner's prayer that the decision below be reversed.

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APPENDIX A

SECTION 5 OF THE COMMUNIST CONTROL ACT OF 1954, 50 USC 844

In determining membership or participation in the Communist Party or any other organization defined in this Act, or knowledge of the purpose or objective of such party or organization, the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person:

(1) Has been listed to his knowledge as a member in any book or any of the lists, records, correspondence, or any other document of the organization;

(2) Has made financial contribution to the organization in dues, assessments, loans, or in any other form;

(3) Has made himself subject to the discipline of the organization in any form whatsoever;

(4) Has executed orders, plans, or directives of any kind of the organization;

(5) Has acted as an agent, courier, messenger, correspondent, organizer, or in any other capacity in behalf of the organization;

(6) Has conferred with officers or other members of the organization in behalf of any plan or enterprise of the organization;

(7) Has been accepted to his knowledge as an officer or member of the organization or as one to be called upon for services by other officers or members of the organization;

(8) Has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of

communication orders, directives, or plans of the organization;

(9) Has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization;

(10) Has mailed, shipped, circulated, distributed, delivered, or in any other way sent or delivered to others material or propaganda of any kind in behalf of the organization;

(11) Has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the organization or to anyone else in behalf of the objectives of the organization;

(12) Has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives, or purposes of the organization;

(13) Has in any other way participated in the activities, planning, actions, objectives, or purposes of the organization;

(14) The enumeration of the above subjects of evidence on membership or participation in the Communist Party or any other organization as above defined, shall not limit the inquiry into and consideration of any other subject of evidence on membership and participation as herein stated.

APPENDIX B

THE COURT: Ladies and Gentlemen of the Jury, it now becomes my duty to instruct you as to the law in this case . . .

It is essential to know what the words "membership" and "affiliation" mean. Membership in the Communist Party is a formal relation between an individual and the Communist Party. To constitute membership the individual must desire to belong to the organization and there must be a recognition by the organization that it considers him a member. Furthermore, membership imports adherence to the objectives of the organization. These are questions of fact which you are to determine from all of the evidence in the case, and as with all questions of fact you must find this beyond a reasonable doubt, based on all the evidence.

Membership or lack of membership in the Communist Party may be established by direct as well as circumstantial evidence. In determining whether or not a particular defendant was a member of the Communist Party at the times alleged in the indictment, you may take into consideration whether the defendant has made himself subject to discipline of the Communist Party in any form whatsoever; has executed orders, plans or directives of any kind of the Communist Party; has acted as an agent, a courier, a messenger, correspondent, organizer or in any other capacity in behalf of the Communist Party; has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the organization; has been accepted to his knowledge as an officer or member of the Communist Party, or as one to be called upon for services by other officers or members of the organization; has written, spoken or in any other way communicated by signal, semaphore, sign, or in any other form of communication,

order, directives or plans of the Communist Party; has prepared documents, pamphlets, leaflets, books, or any other type of publication in behalf of the objectives and purposes of the organization; has mailed, shipped, circulated, distributed, delivered or in any other way sent or delivered to others materials or propaganda of any kind in behalf of the organization; has advised, counseled or in any other way imparted information, suggestions, recommendations to officers or members of the Communist Party or to anyone else in behalf of the objectives of the organization; has indicated by word, action, conduct, writing or in any other way a willingness to carry out in any manner and to any degree the plans, designs, objectives or purposes of the organization; has in any other way participated in the activities, planning, actions, objectives or purposes of the organization. These are some of the indicia of Communist Party membership, but you are not limited solely to those I have enumerated.

As sole arbiters of the facts it is your duty to consider all the evidence, either direct or circumstantial, which bears upon the question of whether or not the defendants were members of the Communist Party on the dates alleged in the indictment.

"Affiliation" as used in the indictment is not the same as membership. The word "affiliation" as used in the indictment means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party. A person may be found to be affiliated with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend on him to cooperate with it and to work for its

benefit for an indefinite period upon a fairly permanent basis. Affiliation includes an element of dependability upon which the organization can rely, which, though not equivalent to membership duty, does rest upon a course of conduct that could not be arbitrarily ended without giving a reasonable cause for the charge of a breach of good faith.

Now, whether or not a defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you ladies and gentlemen are to determine from all of the evidence in the case. Affiliation or lack of affiliation with the Communist Party may be established, as I have stated, by direct as well as by circumstantial evidence. . . .

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 7

JOHN JOSEPH KILLIAN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

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ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinion of the court below is reported at 275 F. 2d 561. The opinion of the court below reversing petitioner's first conviction is reported at 246 F. 2d 77.

JURISDICTION.

The judgment of the Court of Appeals was entered on January 11, 1960. Petition for rehearing was denied on April 13, 1960. On May 4, 1960, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including June 12, 1960. The petition for a writ of certiorari was granted May 1, 1961. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED.

1. Whether it is within the discretion of a trial judge to excuse the production of statements after a complete foundation for their production is laid under 18 U. S. C., Section 3500, when it is known that these statements contain receipts of payment to the prosecution witnesses as *delators* and informers but it is not known how detailed the receipts are or what other statements of the witnesses they contain, and all the prosecution has offered to produce in the stead of these statements is a list of the dates and amounts of payment.

2. Whether the trial court's instruction on the issue of membership

   (a) Improperly defined membership in the Communist Party.

   (b) Was correct in equating membership in the Communist Party and affiliation with that Party.

   (c) Applied the statute in such a way that it provided no ascertainable standard of guilt and abridged First Amendment liberties.

3. Whether the trial court's instruction on the issue of affiliation

   (a) Was incorrect in failing to define affiliation as membership in an organization affiliated to the Communist Party.

   (b) Permitted the jury to return a verdict of guilty on the second count because of activities protected by the First Amendment.

   (c) Applied the statute in such a way that it deprived defendant of Due Process of Law.

4. Assuming that the definition of the statutory term "affiliated with" in 29 U. S. C., Section 159(h) follows the

opinion of this Court in *Bridges* v. *Wixon*, 326 U. S. 135, whether the trial court followed that ruling in defining the phrase to the jury.

STATUTES INVOLVED.

The relevant provisions of the statutes involved, 18 U. S. C., Section 1001, the "false statements" act, 29 U. S. C. 195(h) and 18 U. S. C., Section 3500 are set forth in the Appendix, *infra*, pp. 35, 36, 37.

STATEMENT OF THE CASE.

Petitioner was indicted under 18 U. S. C., Section 1001. The indictment charged in two counts that petitioner had on December 11, 1952 filed with the National Labor Relations Board a false "affidavit of Non-Communist Union Officer" (the oath required by Section 9(h) of the Taft-Hartley Act). The allegedly false statements were that petitioner was not a member of Communist Party (Count I), or affiliated with that Party (Count II).

Petitioner's first conviction was reversed upon appeal to the Court of Appeals for the Seventh Circuit, *United States* v. *Killian* (7th Cir., 1957), 246 F. 2d 77, because the trial court had not followed the procedure for the production of documents approved in this court in *Jencks* v. *United States*, 353 U. S. 657. He was retried, convicted on each count and sentenced to a five year term of imprisonment on the first count and a three year term on the second count, the sentences to be served concurrently. The conviction was upheld by the Court of Appeals, *United States* v. *Killian* (7 Cir., 1960), 275 F. 2d 561. This Court granted a limited writ of certiorari which does not permit a discussion here of the sufficiency of the evidence.

The prosecution's case at trial rested primarily upon the testimony of a single witness, Ondrejka, who had been a

paid informer for the Federal Bureau of Investigation and who testified that he had met petitioner as a Communist at widely separated times in the period 1951-1953. The prosecution also produced testimony from two other witnesses, Fensholt and Sullivan (the latter being also a paid informer for the Federal Bureau of Investigation), who testified that petitioner was a Communist while a student at the University of Wisconsin in 1949 and 1950.

The trial and verdict thus turned primarily upon the jury's belief in the credibility of Ondrejka (and secondarily upon that of Sullivan and Fensholt). Defense counsel, after the direct testimony of Sullivan and Ondrejka, moved under 18 U. S. C. Section 3500 that they be furnished with the witnesses' previous statements relating to the subject matter of their direct testimony (tr. 330, 455-458).[1] Subsequently, in the course of cross-examination it was developed that, in addition to the statements furnished by the prosecution, the witnesses had given periodic statements to agents of the Federal Bureau of Investigation which detailed at least the amounts of their expenses and disbursements for which they were reimbursed (tr. 373, 505). What other information was in these statements was not disclosed by the testimony. Sullivan had signed his statements (tr. 373); Ondrejka had reported his expenditures orally to the agent who had written them down as they were reported (tr. 506). The trial court foreclosed inquiry as to whether or not Ondrejka had signed his statements (tr. 506-509).

After the close of Ondrejka's testimony the defense moved specifically for the production of the statements in question (tr. 547-548).[2] The United States Attorney opposed

1. References preceded by "tr." are to the typewritten transcript of trial proceedings.

2. Cross-examination had raised a serious question concerning Ondrejka's character.

this motion and offered to provide, instead of the original documents, a schedule containing dates of payment and the amounts. This offer was refused by the defense and the trial judge denied the motion.

The trial court's instructions on membership and affiliation are set forth in the appendix, pp. 36-38, *infra*.

SUMMARY OF ARGUMENT.

1. Under the statute the trial judge had no discretion to refuse to order the production of all the "statements" of the witnesses Ondrejka and Sullivan including those in question here. They were squarely within the command of 18 U. S. C., Section 3500, that the trial judge on motion of the defendant "shall order the United States to produce any statement * * * of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." The statute on its face gives the trial judge no discretion; if the trial judge had any discretion under the statute, he could not exercise it understandingly here since he had not seen the documents and could not appraise their value to the defense. Under the circumstances of this case the defendant was deprived of meaningful use of the right of confrontation protected by the Sixth Amendment.

2. The instruction on membership like the instruction on affiliation completely confused the statuses of membership and affiliation which the statute and the authorities make separate and distinct. It defined membership solely in terms of a state of mind without objective criteria, thereby departing from the gloss placed upon the statute by this Court in *American Communications Association* v. *Donds*, 339 U. S. 382, and violating the command of the First Amendment. (Even in defining membership subjectively the instruction was deficient in failing to require that defendant believe himself to be a member.) The purely subjective definition of membership left the jurors free to attach guilt on the basis of their own prejudices. This error was emphasized by the "indicia" of member-

ship given the jurors by the Court. These "indicia," based on the doctrine of parallelism, permitted the jury to rest guilt upon acts protected by the First Amendment and made the statute an engine for the destruction of the rights which that Amendment guarantees.

3. The proper definition of the term "affiliated with" as it occurs in Section 9(h) of the Taft-Hartley Act is membership in an organization which is organizationally linked with the Communist Party. The trial court erred in failing so to instruct the jury. Instead it defined affiliation solely in terms of a subjective state of mind without defined objective factual criteria, thereby permitting invasion by the state of an area which the First Amendment puts beyond the competence of the state. The definition given the jury was so vague, tenuous and uncertain, that the statute as applied did not meet the requirements of certainty in criminal statutes prescribed by the Fifth Amendment and permitted the jury to premise guilt upon the exercise of rights whose innocence is guaranteed by the First Amendment. The instruction given was confusing, since it contained three separate and disparate definitions of affiliation and equated the statuses of membership and affiliation which the statute and authorities declare to be separate and distinct. Assuming, *arguendo*, that the definition of "affiliated with" in this case is controlled by this Court's decision in *Bridges* v. *Wixon*, 326 U. S. 135, the instruction was deficient in failing to instruct the jury that the affiliation must include a working alliance to accomplish the proscribed purposes of the Communist Party—in the case of Section 9(h) the political strike.

ARGUMENT.

POINT I. THE TRIAL COURT'S REFUSAL TO ORDER THE PRODUCTION OF THE WITHHELD STATEMENTS OF THE WITNESSES ONDREJKA AND SULLIVAN WAS CONTRARY TO THE MANDATE OF 18 U. S. C. SECTION 3500.

The statements of the prosecution witnesses, Ondrejka and Sullivan which included a statement of the moneys received by them, and their disbursements were "statements" within the meaning of 18 U. S. C. Section 3500 (e). Sullivan signed his statements. Ondrejka reported his expenditures orally to an agent of the Federal Bureau of Investigation who wrote them down. (The trial court forbade inquiry into whether or not Ondrejka had signed these statements.) Sullivan's statements were therefore "a written statement made by said witness and signed or otherwise adopted by him" (Section 3500(e)(1)). *Prima facie*, Ondrejka's statements fell at least within the scope of Section 3500 (e) (2) (a "substantially verbatim recital" of an oral statement), and perhaps within the scope of Section 3500 (e) (1) as well.

There is likewise no question that proper demand was made by the defense for these statements. A general demand was made by the defense before the cross examinations for all of Sullivan's and Ondrejka's statements in the government's possession. A specific demand was made at the end of Ondrejka's testimony for those statements of Ondrejka which included a report of his expenditures.

It cannot be seriously claimed that these reports do not "relate to the subject matter as to which the witness has testified." In *Rosenberg* v. *United States*, 360 U. S. 367, this Court ruled that a statement useful for impeachment comes within the scope of the statute, even if it does not directly contradict or support the substance of the testi-

mony but simply impeached credibility. Assuming (which we do not) that the reports only set forth the moneys received by the witnesses, the pecuniary interest of a delator would always cast light upon his credibility (cf. *Fisher* v. *United States* (9 Cir., 1956), 231 F. 2d 99).

Given the clear producibility of the statements under the statute it would seem that the ruling of the trial court was plainly erroneous. Even had the record been ambiguous as to whether defense counsel was entitled to the statements the trial judge should have ordered their production before him. As Mr. Justice Frankfurter, concurring, pointed out in *Campbell* v. *United States*, 360 U. S. 85, 108, the trial judge should conduct an inquiry into producibility unless the statements are "patently not producible." The trial court's ruling was not rendered any the less erroneous by the fact that the prosecution had proffered in the place of the demonstrative evidence of the statements, themselves a schedule of dates of payment and amounts. The statute requires that the original statements be furnished to the defense, not the prosecution's bowdlerized version of those statements.

The Court of Appeals affirmed the trial court's ruling as within its discretion because, "it is not conceived" how the statements would enhance the record already made that the witnesses were paid government informants. But that is the main burden of our complaint. As this Court stated in *Gordon* v. *United States*, 344 U. S. 414, 420,

> "For production purposes it need only appear that the evidence is relevant, competent, and outside any exclusionary rule; for rarely can the trial judge understandingly exercise his discretion to exclude a document which he has not seen, and no appellate court could rationally say whether the excluding of evidence unknown to the record was error, or if so it was harmless."

No one could "conceive" what use these documents would have been to the defense until they were produced and it was known what was in them. All that mortal men might do is speculate as to the use which might have been made of them. Petitioner could not rationally say what use he might have made of them since his trial counsel did not see them; the Court of Appeals could not rationally say that the failure to furnish these documents to defense counsel was harmless error, until they were at least made a part of the record by production before the trial judge. Even then such speculation would be dangerous. A jury trial has many intangibles. A document which an appellate court might regard as useless or cumulative may nonetheless be decisive in the hands of trial counsel with every fibre of his conscious and subconscious being tautly attuned to the nuances of the case.[3] As this Court pointed out in *Clancy* v. *United States*, 365 U. S. 312,

> "Since the production of at least some of the statements withheld was a right of the defense, it is not for us to speculate whether they could have been utilized effectively."

In *Palermo* v. *United States*, 360 U. S. 343, this Court ruled that Congress had substituted a stricter statutory procedure for the broader doctrine established in *Jencks* v. *United States*, 353 U. S. 657. We do not believe that Congress, having limited the rights of a defendant in a criminal trial, intended that the trial courts should have "discretion" to limit those rights even further. This is not a matter of trial convenience. This is a Congressional delimitation of the right of confrontation under the Sixth Amendment. Where such a fundamental right is involved, trial convenience must yield. In any event, the trial judge's discretion—if any there be under the statute—is a legal

3. See, Wellman: The Art of Cross Examination (4th Edition, the MacMillan Company, 1936).

discretion and must be exercised "understandingly". The trial judge here, without the documents before him could not exercise an understanding discretion.

POINT II. THE TRIAL COURT'S INSTRUCTIONS ERRONEOUSLY DEFINED THE STATUS OF BEING A MEMBER OF THE COMMUNIST PARTY. THE INSTRUCTIONS GIVEN DEPRIVED DEFENDANT OF DUE PROCESS OF LAW AND PERMITTED CONVICTION TO REST ON THE EXERCISE OF RIGHTS PROTECTED BY THE FIRST AMENDMENT.

MEMBERSHIP.

A. The Confusion of the Statuses of Membership and Affiliation.

Even had the trial court given a proper definition of membership to the jury, we submit that the validity of its instruction would have been vitiated by its erroneous confusion, in the instruction on affiliation, of the statuses of membership and affiliation. When the jury was erroneously told that membership and affiliation were equivalents and also that affiliation was an "alliance", and also that affiliation was a status "less than membership", the result could only be to confuse the jurors as to both statuses, leaving them free to return a verdict of guilty on the membership count on the basis of the invalid affiliation instruction which permitted the jury to rest a guilty verdict on its political prejudices.

The membership instruction itself also erroneously confused the two statuses. As we show below the instruction defined membership solely in terms of subjective intent. The Court then instructed the jury that evidence of "isolated" acts of cooperation or "isolated" expressions showing sympathy with the Communist Party were not "conclusive evidence of membership". This negatively phrased

instruction impelled upon the jury that non isolated acts of cooperation and expressions showing sympathy would be conclusive evidence of membership. But, as we discuss more fully in Point III, under the definition of affiliation given the jury whereby affiliation was also defined only as a subjective relationship, the same evidence would also constitute proof of affiliation. Thus on the operational level as well as the linguistic level the two statuses were confused.

B. The Failure to Define Membership Properly.

This court in *Douds* had a fully developed idea of what constituted membership in the Communist Party. Membership was a definite objective factual phenomenon. One became a member by a specific formal act of joining. ("* * * the act of joining is crucial." 339 U. S. at p. 411.) Once he had joined a member assumed the formal responsibilities of membership. In other words, membership in the Communist Party, once acquired, requires, like membership in other organizations, that the members conform to certain rules.[4] There were objective criteria for obtaining and retaining Communist Party membership.[5]

4. "Members are admitted only upon acceptance as reliable and after indoctrination in its policies to which the member is fully committed. They are provided with cards or credentials, usually issued under false names so that the identification can only be made by officers of the Party who hold the code. Moreover, each pledges unconditional obedience to party authority. Adherents are known by secret or code names. They constitute 'cells' in the factory, the office, the political society, or the labor union." (339 U. S. at p. 432. Mr. Justice Jackson, concurring.)

5. From an abundance of judicial evidence it is clear that the Court's approach in *Douds* is in accordance with the facts. Thus in this case, it was the testimony of the prosecution witness Ondrejka, that as a member of the Communist Party he paid dues (tr. 503-504). In *United States ex rel. Ketunnen* v. *Reimer* (2 Cir., 1936), 79 F. 2d 315 Ketunnen testified that he joined by signing a

The definable objective nature of membership in the Communist Party appears to be a fundamental presupposition underlying the *Douds* ruling. It was on the basis of the congressional finding that the Communist Party was an objectively identifiable, tightly disciplined group that Congress could constitutionally distinguish between membership in the Communist Party and membership in other political organibations, and Communist Party membership might be singled out in the statute without reference to the personal beliefs or practices of the individual members. Had Party membership been considered a more amorphous or tenuous relationship, without objective criteria, this Court could not have upheld the forepart of the oath. Membership then would not necessarily have constituted a relationship where Party discipline was possible and an engagement in political strikes at Communist Party direction might be presumed. The statute would have permitted guilt by association.

The trial court departed from *Douds* and gave the jury a definition of membership couched solely in the subjective terms of a "desire" on the part of the individual to be a member, and a "recognition" by the Party that he is a member. (The Court then went on to instruct the jury how to determine "a state of mind"). Not only does this definition fail to meet the *Douds* requirement that the objective "act of joining" be shown;[6] it is also an inadequate

membership application and tendering dues, subject to acceptance of his application by the Party. In *Dennis* v. *United States*, 341 U. S. 494, the government produced ten undercover agents who had been members of the Communist Party. Party membership cards for eight were offered in evidence. In addition, annual registration cards and transfer cards were made part of the record.

6. This does not mean, of course, that there must be testimony of the actual joining. It does mean that in substance, the court must instruct the jury that it must be convinced from the evidence that the act of ajoining took place and that membership had not been abandoned.

definition of membership in subjective terms. A person may "desire" to be a member of the Communist Party and be "recognized" as such by the Party, yet still not "recognize" or consider that he is a member. Such a person could take the oath in good faith. Under the trial court's instructions such a man could have been found guilty by the jury.

The comments of the Court of Appeals in *Fisher* v. *United States* (9 Cir., 1956), 231 F. 2d 99, 107, are apropos here

> "Membership is composed of a desire on the part of the person in question to belong to an organization and acceptance by the organization. Moreover, certain actions are usually required such as paying dues, attending meetings and doing some of the work of the group."
>
> "* * * Appellant contends that he might honestly state he was not a member if he had failed to comply with any of the Party's formal requirements for membership as stated in its Constitution. The government does not answer this contention in their brief. The jury should have been reminded of the components of the term membership rather than supplied with synonyms."[7]

The trial court, defining membership exclusively in terms of a state of mind, raised the same constitutional question which divided this Court evenly on the validity of the "belief" portion of the oath. Where the crime consists solely of a state of mind (particularly in the area of ideas and politics), proof of that state of mind must rest upon

7. Mr. Justice Burton, concurring in the decision in *Jencks* v. *United States, supra,* cited the *Fisher* decision with approval. The court below may have thought it was following Mr. Justice Burton's opinion in the first paragraph of its membership instruction. But we do not read Mr. Justice Burton's opinion as providing an exclusive definition of membership; it merely pointed up an error below. The unqualified reference to *Fisher* indicates that Mr. Justice Burton adopted the requirement of that case, that the formal requisites of membership be given the jury.

surmise and suspicion, not upon objective fact, and conviction or acquittal must turn upon the prevailing political climate and the orientation thereto of the triers of fact.

> • • • "I cannot deem it within the rightful authority of Congress to probe into opinions that involve only an argumentative demonstration of some coincidental parallelism of belief with some of the beliefs of those who direct the Communist Party though without any allegiance to it. To require oaths as to matters which open up such possibilities invades the inner life of men whose compassionate thought or doctrinaire hopes may be as far removed from any dangerous kinship with the Communist creed as were those of the founders of the present orthodox political parties in this country." (339 U. S. at p. 422; Mr. Justice Frankfurter commenting.)

The trial court's failure to remind the jury of the "components of the term membership" (*Fisher* v. *United States, supra*) was error which left the jury free to write its own definition of what objective circumstances constituted membership in the Communist Party and evidence thereof. If the jurors felt the defendant showed Communist leanings (with all the variations of significance attached to that epithet) they were free to substitute their own political prejudice for evidence of objective acts constituting membership.[8]

This is not mere inference. The instruction itself encouraged the jury to such logic. The jurors were specifically instructed that they might consider isolated acts of cooperation, and isolated expressions "showing" sympathy (not even "of" sympathy) as evidence of membership. The court further charged that "isolated" acts of cooperation with the Communist Party, and "isolated" statements showing sympathy with the Communist Party are not in themselves "conclusive evidence of membership". This

8. "Trifles light as air are to the jealous confirmations strong as proofs of holy writ." Shakespeare: *Othello*, Act III, Sc. 3, L. 323.

half-truth could only carry the inference to the jurors that non-isolated acts of what they considered to be cooperation, and non-isolated expressions which they considered to show sympathy would be conclusive evidence of membership. Having defined membership in the purely subjective terms of "desire" and "recognition," the trial court was compelled to permit the jury to rest its verdict, not upon evidence of membership but upon a subjective evaluation of "cooperation" and "sympathy." But "cooperation" and "sympathy" (no matter how full) are not membership and cannot add up to membership. They are less than membership (although they may constitute affiliation as defined by the trial court). The terms as they were given to the jury by the court are simply empty vessels, to be filled with the logic of parallelism. Under the instructions, the verdict could only have been based upon speculation, not evidence. (The trial court next brought the logic of its position to full circle, explicitly permitting the jurors to base their verdict upon the unconstitutional doctrine of parallelism by its instructions as to the "indicia" of membership.

C. The Erroneous Instruction as to the "Indicia" of Membership.

The trial court instructed the jurors as to certain statutory "indicia" which they might take into account in determining Communist Party membership.[9] The court's use of these statutory "indicia" was, in a very real sense, an abdication of its judicial function to instruct the jury on the law in terms of the facts of the case before it, "to bring into

9. The "indicia" are derived from Section 5 of the Communist Control Act of 1954 (50 U. S. C. Section 844) whose legislative history is discussed in Section IA of the Brief for Raymond Dennis, *et al.*, *amici curiae*. The Court is respectfully referred to this discussion which will not be duplicated here.

view the relations of the particular evidence adduced to the particular issues involved". *Bird* v. *United States*, 180 U. S. 356, 361. As might be expected, the court's use of such "canned" instructions aggravated previous error and created additional error.

Since the court defined membership as solely a subjective phenomenon, the objective "indicia" of membership which it gave the jury became, in a very practical sense, the status itself. As Judge Michael A. Musmanno, sponsor of Section 5 of the Communist Control Act, stated, membership is "spelled out" in terms of factual situations.[10] Congressman Dies, the patron of the bill in the House, said, "you define fifteen factual situations which constitute membership—* * *"[11] The oath required by Section 9(h) thus becomes, not an oath forswearing membership in the Communist Party but one forswearing each of the fifteen "indicia" of membership.

We do not believe that this Court in *Douds* intended to hold constitutional an oath that the affiant had not "indicated by word, action, conduct, writing or in any other way, a willingness to carry out in any manner and to any degree the plans, objectives or designs of the Communist Party" (Item 11 of the indicia). The oath as interpreted by the court below is just such an oath (with the near-meaningless qualification that the "word, action, writing, conduct or any other way" not be "isolated").

Union officers, by the nature of their calling, tend to be intellectually adventuresome men and women, confident of their ability to handle most situations. The nature of the problems which confront their membership may lead them into contact with radical left. Often the "plans, objec-

10. Hearings before Subcommittee No. 1 of the Committee on the Judiciary of the House of Representatives (83d Cong. 2nd Sess.)—Serial No. 14 "Internal Security Legislation," page 131.

11. 100 Cong. Rec. 14652.

tives or designs" of the Communist Party coincide with those of the labor movement or some portion of it. It is one thing to require these men to forswear present membership in the Communist Party. It is another thing to require them to regulate their "words, actions, writings, conduct", etc. in terms of whether or not at some subsequent time a jury will find them to have "indicated • • • a willingness to carry out" in some manner (unspecified) and to some degree (unspecified), the "plans, objectives or designs" (without specification as to their nature or quality) of the Communist Party. The oath no longer affects only a "handful of persons". It reaches the entire labor movement by limiting the freedom of its leadership. We do not believe that the labor movement can be compelled to cut its cloth to fit any political pattern be it Communism or anti-Communism.

Congress, in enacting the statute, dropped from Section 9(h) a provision depriving unions of access to Labor Board procedures if their officers "by reason of active and consistent promotion or support of the policies and doctrines of the Communist Party can reasonably be regarded as being a member of or affiliated with such party • • •[12] The

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12. Section 9(h) of H. R. 6020 as reported by the House Labor Committee would have denied access to Board procedures to any union whose officers included a person who

> "is or ever has been a member of the Communist Party or by reason of active and consistent promotion or support of the policies and doctrines of the Communist Party can reasonably be regarded as being a member of or affiliated with such Party."

A similar provision was inserted by amendment of the Senate bill, S. 1126. The Conference Committee altered both House and Senate bills, recommending Section 9(h) as it was enacted. Senator Tydings discussing this terminology said:

> "When we get down to the determination of what someone says, as to whether a man is promoting the policies of the Communist Party, we often run into a twilight zone and the examination might turn into a witch hunt." 93 Cong. Rec. 5083, 2 Legislative History 1412.

instructions below not only judicially reinstate in the statute this provision which the legislature rejected but go much farther. The "twilight zone" which the late Senator Tydings foresaw has taken over the statute. The proposal which Congress rejected at least required that the officers "reasonably" be considered members. The Musmanno bill which the trial court incorporated in its instruction did not even pay superficial deference to the rule of reason. The indicia are rife with criteria of guilt not reasonably related to membership in the Communist Party.

Careful analysis of the instructions indicates that a person might come within each of the eleven "indicia" given the jury (with the possible exception of item 4) and still not have acquired the status of membership. Thus, a person could make a contribution to the Communist Party earmarked for some worthy part of its program (item 1), without membership. The court itself recognized that attendance at Communist meetings (item 2) was not necessary proof of membership (tr. 708). See also *Bridges* v. *United States* (9 Cir., 1952), 199 F. 2d 811, 836.

The statutory indicia as given to the jury permitted the jurors to consider the most remote and insubstantial evidence (or testimony of no evidentiary value) as evidence of guilt. There is no limitation as to time in any of the indicia. No matter how temporally and logically remote the proof of the "indicia" was, the jury was instructed that it might take it into consideration as evidence of membership. Moreover, each of the indicia has an open end which prohibits its limitation to any reasonable bounds (even assuming validity of the theory of parallelism upon which the instructions are based). Each of the "indicia" (except the seventh) uses phrases such as "any," "and other type,"

"of any kind," "in any manner," "to any degree," "in any way" or "in any other way." Nowhere was the jury instructed how it should consider the degree and quality of the indicia as shown in the evidence. The failure to limit the evidentiary use of the "indicia" to their evidentiary value (if any) left the jury free to incorporate its own prejudice into the "indicia."

Should the jurors have had any doubt that parallelism was the essence of the definition of membership given them by the court, item 11 of the "indicia" would have removed it. By the terms of that paragraph it is evidence of membership that the defendant had indicated "in *any* • • • way a willingness to carry out in *any* manner and to *any* degree the plans, objectives or designs of the Communist Party." (Emphasis supplied.) As the Wall Street Journal put it, apparently referring to this clause,

> "One of these provisions is that it would be evidence of cooperation with Communist groups if any person has indicated a willingness to carry out the aims and purposes of the party. For all we know the Communist Party may be against juvenile delinquency. So is this newspaper."

The jury was not even instructed that the defendant had to know of the parallelism. It was sufficient if defendant's acts were done "voluntarily and purposefully" as opposed to "because of a mistake or inadvertance" (tr. 674).

The theory of parallelism is not a new one. It is essential to every heretic hunt where the subjective mental processes of a man, and not the quality of his acts are in question. All faiths now recognize the excesses of the Inquisition. Certainly the drafters of the Bill of Rights thought they were forbidding a repetition of those excesses. The instructions permitting use of the "indicia" as evidence of

guilt are a revival of the long dead practices of the Inquisition and should not be upheld by this Court.[13]

13. Lea: *The Inquisition of the Middle Ages* (Citadel Press, First Paperbound Edition, 1961) describes the use of the logic of "parallelism" by the Inquisition

> "From almost the inception of the Holy office there was an effort to lay down rules as to what constituted evidence of heresay; but the Council of Narbonne, in 1244, winds up an enumeration of the various indications by saying that it is sufficient if the accused can be shown to have manifested by any word or sign [cf. 'in any way'] that he had faith or belief in heretics or considered them to be 'good men' (bos homes). (p. 127)
>
> • • • • •
>
> "Naturally the conscientious inquisitor recognized the vicious circle in which he moved and sought to satisfy himself that he could designate infallible signs which would justify the conclusion of heresy. There is ample store of such enumerated. Thus for the Cathari it sufficed to show that the accused had venerated one of the perfected, had asked a blessing, had eaten of the blessed bread or had kept it, had been voluntarily present at an heretication, had entered into the *convenansa* to be hereticated on the deathbed, etc. For the Waldenses such indications were considered to be the confessing of sins to and accepting penance from those known not to be regularly ordained by an orthodox bishop, praying with them according to their rites by bending the knees with them when they pretended to make the Host, receiving 'peace' from them, or blessed bread. All this was easily catalogued, but beyond it lay a region of doubt concerning which authorities differed. The Council of Albi, in 1254, declared that entering a house, in which a heretic was known to be, converted simple suspicion into vehement; and Bernard Gui mentions that some inquisitors held that visiting heretics, giving them alms, guiding them in their journeys, and the like was sufficient for condemnation, but he agrees with Gui Foucoix in not so considering it, as all this might be done through carnal affection or for hire. The heart of man, he adds, is deep and inscrutable, but he seeks to satisfy himself for attempting the impossible by arguing that all which cannot be explained favorably must be admitted as adverse proof. It is a noteworthy fact that in long series of interrogations there will frequently be not a single question as to the belief of the party making confession. The whole energy of the inquisitor was directed to obtaining statements of external acts. The upshot of it all necessarily was that almost everything was left to the discretion of the inquisitor, whose temper had more to do with the result than the proof of guilt or its absence. . . . Under such a system the most devout Catholic could never feel safe a moment." (pp. 128-129).

POINT III. THE TRIAL COURT ERRONEOUSLY INSTRUCTED THE JURY CONCERNING THE STATUS OF BEING "AFFILIATED WITH" THE COMMUNIST PARTY. THE INSTRUCTIONS GIVEN DEPRIVED DEFENDANT OF DUE PROCESS OF LAW AND PERMITTED CONVICTION TO REST ON THE EXERCISE OF RIGHTS PROTECTED BY THE FIRST AMENDMENT.

A. To Be "Affiliated With" the Communist Party Within the Meaning of Section 9(h) Is to Be a Member of an Organization Affiliated With the Communist Party. Any Other Interpretation of the Statute Violates the First and Fifth Amendments.

Webster's New International Dictionary defines "affiliate" as follows:

> "To connect or associate oneself with; to adopt, hence usually to bring or receive into close connection; to ally."

The text of Section 9(h) makes clear that Congress intended the phrase "affiliated with" as it appears in the statute not to have as broad a meaning as the dictionary definition permits.

The oath prescribed by Section 9(h) reaches five separate statuses, being a "member" of the Communist Party, being "affiliated" with such party, "belief" in the overthrow of the United States Government by force or any illegal or unconstitutional method, being a "member" of an organization that believes in or teaches such overthrow, and "support" of such an organization. The itemization of the separate concepts, as well as the use of the disjunctive "or" between the membership and affiliation sections show that Congress regarded membership and affiliation as different statuses, a not uncommon congressional usage. (A similar differentiation of the two statuses is made by

the Immigration and Nationality Act,[14] which penalizes "whoever becomes or is a member of, *or* affiliated with any such society etc." (emphasis supplied) and the Smith Act.[15] As far as counsel can determine, every tribunal except the trial court below which has discussed the term "affiliated" has likewise differentiated it from a membership status.

In *American Communications Association* v. *Douds*, 339 U. S. 382, this Court seems to have taken the view that one is "affiliated with" the Communist Party by being a member of an organization which is affiliated (*i.e.*, organizationally linked) to that Party. Thus Chief Justice Vinson spoke of the Act as applying to "members of the Communist Party and affiliated organizations" (p. 406). Mr. Justice Frankfurter, who found the forepart of the oath to be constitutional spoke of it as a disavowal of "actual membership in the Communist Party, or in an organization which is in fact a controlled cover for that party" (p. 421). Mr. Justice Black spoke of the oath as reaching members of the Communist Party or its "affiliates" (p. 450).

This view of one meaning of the term "affiliated with" flows logically from the Court's view of the statute in *Douds*. The purpose of the statute is the prevention of political strikes. The "belief" and "support" provisions of the oath, so the Court held, reach those persons whose state of mind might cause them to lead political strikes. The membership provision deals with ascertainable, objective fact from which, this Court held, Congress might legitimately infer a likelihood of engaging in political strikes. If the correlative term "affiliated with" the Communist Party be given the like meaning of knowing membership in an organization affiliated to the Communist Party, then the Congressional scheme as defined by this Court is pre-

14. 8 U. S. C. Section 1182(a)(28)(A), Section 1101(e)(1).

15. 18 U. S. C. Section 2385.

served since "affiliated with" would likewise deal with an ascertainable objective fact.

Such an interpretation would conform with the traditional use of the term in the labor and radical movements—and the oath was to be taken by trade unionists—whereby "affiliation" refers to a relationship between organizations. (Section 9 (h) itself uses the term in a similar fashion when it speaks of "such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit.") The Communist Party, as well as the Socialist Party from which it came, seem, at one time or another to have followed this organizational form, having both direct membership and indirect membership through affiliated organizations.[16]

This Court has long followed the policy of choosing that interpretation of a statute which will avoid constitutional questions over an interpretation that will raise them, *Communist Party* v. *Catherwood*, ... U. S. ..... (not yet officially reported), a policy which will be served here by following the definition of the term which, we believe, was laid down by this Court in *Douds*. Any definition of "affiliated with" which is broader than the one we suggest must approach the meaning of the term when used in the immigration statutes as defined by this Court in *Bridges* v. *Wixon*, *supra*.[17] But as Mr. Justice Jackson pointed out, whatever the validity of such a statute as applied to an alien in an immigration situation, "there is no analogy between what Congress may require of an alien as a condi-

16. See, Foster: History of the Communist Party, pp. 114, 117, 181, 190. Draper: Roots of American Communism, pp. 66, 225, 273.

17. The *Bridges* case defines "affiliated with" in terms of a subjective relationship with the Communist Party (other than membership) to achieve its proscribed objective.

tion of admission or citizenship and what it may require of a citizen." 339 U. S. at p. 436. To apply the *Bridges* definition of "affiliated" to Section 9(h) in combination with 18 U. S. C., section 1001 opens a Pandora's box of constitutional questions.

The first of these constitutional problems, is that affiliation in *Bridges* is defined only in terms of the mental attitude of the individual involved, with no objective criteria of guilt, cf. *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624. The jury is thereby compelled to base its finding of guilt or innocence upon its own ideas or prejudices concerning what facts constituted affiliation. (Since we have discussed the consequences of such a definition in Point II we will not enlarge upon that argument here.)

When measured against the requirement of due process that terms of criminal statute be definite and certain in their meaning (cf. *Connolly* v. *General Construction Co.*, 269 U. S. 385, *United States* v. *Cohen Grocery Co.*, 255 U. S. 81), the meaning of "affiliated" in the immigration and nationality statutes is plainly inadequate. In *United States ex rel. Ketunnen* v. *Reimer*, (2 Cir., 1936), 79 F. 2d 315, the court did not even attempt to give a comprehensive definition of the word "affiliated" as used in the statute. The court thought "very likely that is as impossible as it is now unnecessary." In *Douds*, Mr. Justice Frankfurter cited *Bridges* v. *Wixon* as illustrating "the dubious scope of the term 'affiliated'" (339 U. S. at p. 420). In the *Bridges* case itself the various administrative officers and courts were unable to agree upon the meaning of the term in the immigration statute (cf. 49 F. Supp. 292, 307; 114 Fed. 927, 938, 941; 326 U. S. 135, 142 ff.). In *Inland Steel* v. *National Labor Relations Board* (7 Cir., 1949), 170 F. 2d 247, 262, aff'd, 339 U. S. 382, Judge Major (in dissent), referring to the word affiliated stated, "The [Supreme] Court's decision [in *Bridges*] is convincing that its mean-

ing would be quite beyond the reach of the ordinary citizen."

The correctness of Judge Major's prophecy is demonstrated by the experience of the courts themselves in administering Section 9(h). The various trial and appellate judges have been unable to agree among themselves as to the definition of the term "affiliated with." In the two trials of this very case the same trial judge gave different instructions concerning "affiliation." In the first trial the trial judge defined it as "less than membership." At the second, the trial judge defined it as the "equivalent" of membership. (The Court of Appeals approved both instructions!) In *Hupman* v. *United States* (6 Cir., 1955), 223 F. 2d 598, the trial court merely instructed the jury to follow the dictionary definition of affiliation and that it meant "something less than membership but more than sympathy." A similar instruction was given by the trial court in *Jencks* v. *United States, supra.* On certiorari three members of this Court disagreed as to the propriety of that instruction (JJ. Burton and Harlan finding the instruction inadequate under *Bridges,* Mr. Justice Clark finding it adequate). In *Fisher* v. *United States, supra,* the trial court's instruction giving the jury the dictionary definition of "affiliated" was held insufficient because it failed to advise the jury that "affiliation" comprehended a continuing reciprocal relationship involving duties and responsibilities. In *Bryson* v. *United States* (9 Cir., 1956), 238 F. 2d 657, the Court of Appeals disapproved the trial judge's failure to instruct the jury that proof of affiliation included proof of adherence to the objectives of the Communist Party as distinguished from mere cooperation with its lawful activities.

Surely when the trial and appellate courts are in such manifold disagreement, no layman using *Bridges* v. *Wixon* as his guide could be reasonably expected to interpret

intelligently the required oath as to affiliation, and he could not be constitutionally tried for a false statement in connection therewith. (Bridges, himself, could not have known in advance of this Court's decision in *Bridges* v. *Wixon*, whether or not he would be held to be "affiliated with" the Communist Party.)

Still another constitutional question would be raised under the First Amendment by the use of the indefinite *Bridges* v. *Wixon* definition of "affiliated." In *Douds* this Court upheld the oath as to membership in the Communist Party because, it held, Congress could constitutionally infer that membership in the Communist Party was indicative of a potential engagement in political strikes. This Court emphasized in its opinions, the limited nature on the impingement upon the First Amendment freedoms of unions and their officers (339 U. S. at pp. 397, 404, 409). "Affiliation" under the *Bridges* definition is a much broader concept than membership. Membership in the Communist Party may signify acceptance of the Communist Party's alleged use of the political strike. "Affiliation" need not. A person may "enter into an alliance" with the Communist Party for the achievement of its "purposes or objectives" of a socialistic state yet still neither accept its discipline nor endorse its methods. Congress could not rationally assume such a person to be more likely than any other to engage in a political strike. Indeed the contrary is more likely the case. Rejection of Communist Party discipline by not undertaking membership although accepting the Party's objectives indicates a man who has already rejected the Party's putative methods—including the political strike. Thus if the *Bridges* v. *Wixon* definition of "affiliated" be likewise that of Section 9(h), the constitutional rationale for the upholding of Section 9(h) fails. Section 9(h) would in truth provide "guilt by association." Congress would have penalized a man and his union—not

because of his own actions or beliefs—but solely because of his associations with others in activities protected by the First Amendment. It is well established that the First Amendment protects the rights of citizens to associate with others for political purposes. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; *DeJonge* v. *Oregon*, 299 U. S. 353; *Cruikshank* v. *United States*, 92 U. S. 542. Congress cannot constitutionally make that association criminal.

The *in terrorem* effect of such a statute would produce an even more pervasive restriction of First Amendment rights. As we have shown above, the *Bridges* v. *Wixon* definition of "affiliated" is vague and indefinite. Proof of "affiliation" is fundamentally proof of a man's political attitudes. A jury would therefore be left free, in finding guilt or innocence to flesh out the skeletal definition of "affiliated" with its own political prejudices.

In the present day world "Communism" has become a political epithet. In certain Southern areas, proof of integrationist activities would be regarded as proof of Communist "affiliation." In other areas, even discussion advocacy of the advisability of recognition of Red China is Communist. To some people, a resolute adherence to fair play and civil rights is affirmative evidence that a person is "soft on Communism," to some the fact that a man is a union member or officer is evidence of Communism. We do not fully understand the John Birch Society's definition of a "comsimp." We are sure that those who do understand it could not distinguish between such a person and one "affiliated with" the Communist Party as defined in *Bridges*. The net effect therefore, of the transposition of *Bridges* v. *Wixon* to Section 9(h) would be to encourage a union officer to take or refrain from taking political positions, not because he thought they were wrong, but because they were unpopular. A statute so broad as to restrict First Amendment rights in such a manner is unconstitu-

tional even if its ambit also includes activities which may properly be condemned, *Winters* v. *New York*, 333 U. S. 507; *Herndon* v. *Lowry*, 301 U. S. 242.

Not only must a union officer forfend all "dangerous thoughts," he must police his associations as well. If he finds himself upon a strike committee or in a political meeting with a Communist, safety requires he withdraw. Moreover, Communists notoriously conceal their identity. He must shun therefore, not only contact with avowed Communists; he must screen all his contacts for their political opinions. Otherwise he cannot tell when his own innocent associations may be used against him as evidence of illegal "affiliation."

We do not contend that with the passage of Section 9(h) the officers of the American labor movement become political eunuchs. We do contend that they are men like any others, some timid, some brave, some wise, some foolish, with all the variations in between and that the inevitable effect of incorporating the *Bridges* definition of "affiliated" into Section 9(h) is to make the less brave and wise restrict their associations and activities protected by the First Amendment. The First Amendment does not require that men be brave or wise to maintain their rights.

It is no answer to say that the statute only punishes a "knowing" misstatement as to affiliation, and that the *in terrorem* effect of the statute is lessened thereby. Within a wide range the *Bridges* v. *Wixon* definition of "affiliated" must leave the application of that term to the jury. Guilty knowledge under the *Bridges* definition is to be derived by the jury from a man's knowledge of facts which the jury (in all its prejudices) thinks constitute affiliation. A defendant's contention that he had a different definition of the term in mind would be given short shrift indeed. No sensible man viewing the *Bridges* litigation, or the

two trials and two appeals of this very case, would risk the fortune of money, time and energy—not to speak of the personal anxieties and fear for loved ones—involved in a possible vindication by the courts, upon the hazard that a jury would find that if he was "affiliated with" the Communist Party in the *Bridges* sense of the term, he was not "knowingly" so affiliated. cf. *Musser* v. *Utah*, 333 U. S. 95.

Moreover, the very fact of indictment would limit First Amendment rights. Section 9(h) provided for annual oaths. Having been indicted for one oath, a man should be most reluctant to retain union office where he would be required to take another oath while the previous indictment was pending. Thus even if finally held innocent, a union officer might be penalized by reason of the unconstitutional broadness of the oath.

B. Assuming That Bridges v. Wixon Does Provide a Proper and Constitutional Base for the Instructions to the Jury Concerning the Meaning of "Affiliated With" in the Oath, the Instruction Given by Trial Court Did Not Meet the Requirements of That Precedent. The Instruction It Gave Was Contradictory; It Provided Only the Appearance of Guidance for the Jury Without the Substance; and It Permitted Conviction on the Basis of Activities Protected by the First Amendment.

The constitutional foundation for the validity of the oath lies in the actual or potential connection of the statuses forsworn to the political strike. The keystone of the *Bridges* ruling is that the "affiliation" must encompass the evil at which the statute is aimed, the organization's "unlawful objectives" (326 U. S. at p. 146, see also 326 U. S. at pp. 143, 144). Under Section 9(h) the proscribed objec-

tive of the Communist Party is the use of the political strike. The trial judge should have charged the jury that the "affiliation" charged in the indictment was acceptance of the Communist use of the political strike.

The trial judge's refusal so to charge (although requested, tr. 610) left the jury free to apply the statute unconstitutionally. Even if the jury found that what it felt to be the defendant's "affiliation" did not encompass endorsement, or acceptance of political strikes it could return a verdict of "guilty." An instruction which permits such a verdict is improper. *Stromberg* v. *California*, 283 U. S. 359; *Bryson* v. *United States, supra.*

In the instant case the deficiency of the instruction was highlighted by the instruction given. The jury was instructed that "affiliated" meant a "relationship short of and less than membership in the Communist Party • • • but more than mere sympathy with its aims." This could only create confusion in the minds of a jury. How much more than sympathy? How much short of membership? The range of attitudes comprehensible between the extremes of these two concepts is almost limitless. Absent an instruction to the jury directing its deliberations to the evil at which the statute is aimed, those deliberations could only have been couched in terms of whether or not it considered the defendant to be communistically inclined. The vagueness of instruction permitted the jury to substitute political epithets for fact finding.

Nor did the second paragraph of the instruction sufficiently narrow the overly broad definition of the first paragraph (the second paragraph is apparently based on *U. S.* v. *Ketunnen Reimer, supra,* where the court itself confessed its inability to fully define the term "affiliated with"). What constitutes an "alliance"? Again without a pinpointing of the prohibited state of mind the jury

is reduced to political epithets for a basis for its verdict.[18] Moreover, the first two paragraphs are contradictory. The second paragraph delimits a relationship conceptually nearer that of membership than of sympathy. (The distance in constitutional significance between "alliance" and "membership" is a vast one. What is constitutionally important under the First Amendment is the difference not the similarity.) The jury in trying to reconcile the first two paragraphs of the instruction may well have broadened the scope of the second paragraph, rather than narrowed the scope of the first paragraph.

In its third paragraph the instruction compounds confusion by equating membership and affiliation "in all but name."[19] In the first place, this is incorrect. This Court ruled in *Bridges* that affiliation is "not equivalent to membership duty" (326 U. S. at p. 142), and as we have shown above the act itself treats the statutes as distinct and separate. In the second place, the instruction is rendered completely contradictory. The jury was told in one breath that "affiliated" means a relationship of less than membership, and in the next breath that it was equal to membership. Contradictory instructions are no instructions. In the third place, the instruction incorporates into the definition of "affiliated with," all the defects of the definition of membership which we have discussed in Point II.

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18. In *Bridges*, Judge Sears followed a similar definition. He found Bridges to be affiliated with the Communist Party because he opposed "red baiting" in the union. If any adherent of *ad hominem* logic were on the jury, the trial judge's instructions left him completely free to make a finding similar to that of Judge Sears.

19. The Court refused to give the defendant's requested instruction that the defendant could not be convicted on both the membership and affiliation counts (tr. 605). Thus the Court in giving both counts to the jury emphasized to it the error in the instruction that membership and affiliation were to be equated.

CONCLUSION.

On the foregoing arguments and the decisions cited, the judgment in this case should be reversed and a new trial directed.

Respectfully submitted,

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August 21, 1961.

APPENDIX.

STATUTES INVOLVED.

18 U. S. C., Sec. 1001:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 749.

18 U. S. C., Sec. 3500:

Demands for production of statements and reports of witnesses

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter

of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statements to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

1. a written statement made by said witness and signed or otherwise adopted or approved by him; or

2. a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595.

29 U. S. C., Sec. 159(h):

No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 160 of this title, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits. July 5, 1935, c. 372, Sec. 9, 49 Stat. 453; June 23, 1947, 3:17 p. m., E. D. T., 120, Title I, Sec. 101, 61 Stat. 143; Oct. 22, 1951, c. 534, Sec. 1 (c. d), 65 Stat. 601.

THE INSTRUCTIONS TO THE JURY.

The instruction on membership:

"Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those persons who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member.

"Intent is a state of mind and can only be determined by what an individual says and what he does. In determining the issue as to whether the defendant was or was not a member of the Communist Party at the time alleged in the indictment you may take into consideration the acts and statements of this defendant, as disclosed by the evidence, bearing in mind that individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the Communist Party are not in themselves conclusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in this case.

"In determining whether or not the defendant was a member of the Communist Party at the time alleged in the indictment you may take into consideration whether the defendant:

1. Paid dues or made any financial contributions to the Communist Party or collected any funds on its behalf;

2. Attended Communist Party meetings, classes, conferences, or any other type of Communist Party gathering;

3. Had made himself subject to the discipline of the Communist Party in any form whatsoever;

4. Participated in any recruiting activities on behalf of the Communist Party;

5. Has executed orders, plans or directives of any kind of the Communist Party;

6. Has acted as an agent, messenger, correspondent, organizer, or in any other capacity in behalf of the Communist Party;

7. Has been accepted to his knowledge as an officer or member of the Communist Party, or as one to be called upon for services by other officers or members of the Communist Party;

8. Has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the Communist Party;

9. Has spoken or in any other way communicated orders, directives, or plans of the Communist Party;

10. Has advised, counseled, or in any other way imparted information, suggestions, or recommendations, to officers or members of the Communist Party, or to anyone else, in behalf of the Communist Party;

11. Has indicated by word, action, conduct, writing, or in any other way, a willingness to carry out in any manner and to any degree the plans, objectives or designs of the Communist Party;

12. Has in any other way participated in the activities, planning or actions of the Communist Party.

"These are some of the indicia of Communist Party membership, but you are not limited solely to those I have enumerated. As sole arbiters of the facts, it is your duty to consider all the evidence, either direct or circumstantial, which bears upon the question of whether or not the defendant was a member of the Communist Party on the date alleged in the indictment." (Tr. 704-707.)

The Instruction on affiliation:

"The verb 'affiliated', as used in the Second Count of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.

"A person may be found to be 'affiliated' with an organization, even though not a member when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis.

"Briefly stated, affiliation as charged in the Second Count of the indictment, means a relationship which is equivalent or equal to that of membership in all but name.

"Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you are to determine from all the evidence in the case. Affiliation or lack of affiliation in the Communist Party may be established by direct as well as circumstantial evidence.

"In determining the issue as to whether the defendant was or was not affiliated with the Communist Party at the time alleged in the indictment, you may take into consideration any statements made or acts done by the accused, and all other facts and circumstances in evidence which may aid determination of the issue." (Tr. 679-680).

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 7

JOHN JOSEPH KILLIAN

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 37–55) is reported at 275 F. 2d 561. The prior opinion of the court of appeals (Pet. App. 28–36) is reported at 246 F. 2d 77.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 1960 (Pet. App. 56). A petition for rehearing was denied on April 13, 1960. On May 4, 1960, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to and including June 12, 1960. The petition was filed on June 11, 1960, and was granted on February 20, 1961, limited to questions 3 and 6 presented in the petition, 365 U.S. 810.

QUESTIONS PRESENTED

Questions 3 and 6 in the Petition (Pet. 3) are as follows:

3. Whether the instructions to the jury properly defined membership in and affiliation to the Communist Party.

6. Whether the production of statements which report payments to those witnesses, as informers, is excused after a complete foundation for their production under 18 U.S.C. Sec. 3500 is laid, when all that the government has offered to produce at trial is a list of the amounts and dates of payments and there is no evidence as to what other facts are reported in those statements.[1]

STATUTES INVOLVED

18 U.S.C. 1001, 29 U.S.C. 159(h), and 18 U.S.C. 3500 appear at Pet. App. 25–27. Section 5 of the Communist Control Act of 1954, 50 U.S.C. 844, appears in the brief of the *amici curiae* at pp. 28–29.

STATEMENT

Petitioner was charged, in a two-count indictment, with making a false statement in a non-Communist affidavit filed with the Regional Office of the National Labor Relations Board on December 11, 1952. At that time Section 9(h) of the Labor Management Relations Act, 29 U.S.C. 159(h),[2] pro-

[1] As the government sees this issue, the question before this Court is:

Whether the production of receipts and records of payments to witnesses who made reports to the F.B.I. is required under 18 U.S.C. 3500, when the government offers at the trial to produce complete lists of payments.

[2] This section was repealed by P.L. 86-257, 86th Cong., 1st Sess., Sec. 201(d), 73 Stat. 519, 525.

vided that the Board should make no investigation of a charge by a labor organization, or issue a complaint based on such a charge, unless each officer of the organization had on file with the Board an affidavit that he was not a member of, or affiliated with, the Communist Party. The statute makes the provisions of 18 U.S.C. 1001 (the False Statement Act) applicable to such affidavits. Count I charged that petitioner had sworn falsely that he was not a member of the Party in the affidavit and Count II charged that he had sworn falsely that he was not affiliated with the Party.

Petitioner's earlier conviction on the same charge was affirmed by the Court of Appeals for the Seventh Circuit. *United States* v. *Killian*, 246 F. 2d 77. On rehearing, however, that court reversed the conviction on the authority of *Jencks* v. *United States*, 353 U.S. 657. *United States* v. *Killian*, 246 F. 2d 77, 82. A second trial also resulted in a verdict of guilty on both counts, and petitioner was sentenced to five years' imprisonment on Count I and three years on Count II, the sentences to run concurrently. The Court of Appeals affirmed the conviction. *United States* v. *Killian*, 275 F. 2d 561 (C.A. 7).

The facts adduced at the second trial are as follows:

Petitioner was a member of the executive board of Local 1111, United Electrical, Radio and Machine Workers of America. A special meeting of the officers of the Local was held on December 9, 1952, for the purpose of having the officers execute non-

Communist affidavits (Tr. 104, 120).[3] As each officer came into the office, he was given a copy of the affidavit (NLRB Form 1081), and told to read and then sign it (Tr. 104, 116–117, 132).[4] As each officer signed his affidavit, it was notarized and placed in a stack with the affidavits which had previously been executed and notarized (Tr. 103, 118, 157). The completed affidavits were then placed in an envelope in the presence of, or under the direction of, the president of the Local and mailed to the National Labor Relations Board (Tr. 105, 119–120).

Upon receipt of the affidavits at the Chicago Regional Office of the National Labor Relations Board on December 11, 1952, the compliance officer checked them for completeness and to insure that each officer of the local union had executed an affidavit (Tr. 9, 12, 19–20, 25–26; Gov. Ex. 1–B, 1–U). Local 1111 was thereupon notified that it had compiled with the Act and could avail itself of the facilities provided by the Board (Tr. 18–19; Gov. Ex. 1–A).

The government's evidence as to petitioner's membership in the Communist Party covered the period from 1949 to 1953. Government witness Robert B. Fensholt testified that he became a member of the Communist Party while attending the University of Wisconsin (Tr. 159–161). He attended his first

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[3] "Tr." refers to the typewritten transcript filed with this Court.

[4] On the face of the form, just below the title, appears the following: "See Instructions on the reverse side" (Gov. Ex. 1–L). These instructions provide information as to who must file and the procedure to be followed.

Party meeting in October or November 1949 (Tr. 164), when he was introduced to fellow members in the Party cell to which he had been assigned (Tr. 165). Among those Party members was petitioner, whom Fensholt had known previously (Tr. 164–166). Fensholt, along with petitioner, was a member of the Student Branch of the Dane County Communist Party, a group composed of students on the University of Wisconsin campus in 1949–1950 (Tr. 166–167). Meetings were held three or four times a month and petitioner attended regularly; several meetings were held at petitioner's apartment (Tr. 166). Petitioner's assignments included working on behalf of the Party in the National Association for the Advancement of Colored People and in the National Lawyers Guild (Tr. 174–176). In short, Fensholt knew petitioner as a member of the Communist Party (Tr. 165).

Government witness Robert E. Sullivan testified that he joined the Communist Party in 1948 at the request of the Federal Bureau of Investigation (Tr. 368), and in late October 1949 he transferred his Party membership from Cincinnati, Ohio, to Madison, Wisconsin (Tr. 305, 306–307). After identifying himself, by secretive means, to Andrew Remes, Wisconsin State Chairman of the Communist Party, Sullivan was told that he would be contacted by someone in Madison (Tr. 306–307). In December 1949, Sullivan received a note requesting him to telephone petitioner, and upon his doing so a meeting with petitioner was arranged (Tr. 309). At this meeting, petitioner identified himself as the section or-

ganizer for the Party in Madison, and said that because of the need for security the section was being broken up into branches and eventually into smaller groups of 3 to 5 persons, each group having a particular assignment (Tr. 310–311). Petitioner described the assignments as the infiltration of various organizations and told Sullivan that he (petitioner) would let him know later to which group Sullivan would be assigned; but in the meantime petitioner assigned Sullivan to a campus group (Tr. 312–313). Sullivan attended Communist Party group meetings in 1949 and 1950 at which petitioner was a Party spokesman or leader (Tr. 316–325).

Sullivan testified that at a Communist Party meeting held in Madison in January 1950, at which petitioner was present, Remes stated that one could be a Party member without revealing his membership in an application for federal employment because the Party could "impose security measures on him" (Tr. 317–322). Also in January 1950, petitioner reassigned Sullivan and five or six of the older Party members to the downtown group (Tr. 326–327).

Sullivan also testified that he gave written reports to the F.B.I. with respect to the Party meetings he attended and other Party activities at the time or within a few days after they occurred (Tr. 327–328). At the close of Sullivan's direct testimony, petitioner moved for production, for use in cross-examination, of all statements given by Sullivan to the F.B.I. relating to the direct testimony (Tr. 330, 352). These statements were produced by the government to the court in camera to determine the portions related to

the witness's direct testimony (Tr. 331–332, 351). The court deleted the unrelated part and turned the rest of the statements over to petitioner (Tr. 342–360). The unexcised statements were preserved for the court of appeals (Tr. 360).

On cross-examination, Sullivan testified that he was paid by the F.B.I. for his services in cash beginning in 1946 at the rate of $25 plus $10 for expenses each month, including Party dues and payments for Party literature (Tr. 370, 373-374). The monthly amount was increased, including the $10 for expenses, in 1947 to $50; in 1948 to $75; in 1949 to $85; in 1950 to $110 (Tr. 371–372). Sullivan testified that, when he received the money from the F.B.I. for his expenses, he signed a receipt (Tr. 373). Sullivan's connection with the F.B.I. terminated in 1952 (Tr. 373).

After the completion of the cross-examination of Sullivan, petitioner again moved for production of all statements, without excisions, made by the witness to the F.B.I. (Tr. 398). The government opposed the motion on the ground that (1) there was no factual background to show the relation of these statements to the witness's direct testimony, and (2) the government had already produced all statements that related to the direct testimony of the witness (Tr. 399). Petitioner's motion was denied (Tr. 399). Petitioner then moved to strike the testimony of the witness, and this motion was also denied (Tr. 399–400).

Government witness Michael J. Ondrejka testified that he joined the Communist Party at the request of the Federal Bureau of Investigation in October 1949 and that he remained a member of the Party until November 1953 (Tr. 408–409). He stated that he knew petitioner to be a member of the Party from April 1951 to August 1953 (Tr. 413–414). Ondrejka was first introduced to petitioner in January and February 1951 at meetings of the Labor Youth League (Tr. 415), a Communist-front organization (Tr. 504). He next met petitioner in April 1951 at a meeting at the home of Jack Kling, who was the State Chairman of the Communist Party of Wisconsin (Tr. 416–417). Kling stated that the purpose of the meeting was to find out whether the persons attending were interested in attending "Communist Party Educationals," since "in order to become more effective Communists we must as Communists engage in the theoretical aspects of the Party as well as in other lines of work in the Communist Party" (Tr. 418). Petitioner said that he was interested in attending (Tr. 419). Petitioner gave a report on one of the educational classes at a meeting in June 1951 (Tr. 421). He stated that an upsurge of nationalism in the Far East had resulted in an effort to throw out the "capitalistic oppressers," but that this movement could only succeed under "the guidance and the leadership of the Communist Party" (Tr. 423).

In the middle of November 1951, Ondrejka testified, a closed Party meeting was held at petitioner's house (Tr. 424–425). Petitioner stated that the purpose of the meeting was to form a Party cell at the

Allen-Bradley plant. One of the purposes of the cell was to cultivate social contacts with the workers of the plant in order to recruit them into the Party (Tr. 425–426). Petitioner told Ondrejka that it was important that they both become stewards in the shop (Tr. 427). Subsequently, both did become stewards and attended stewards' meetings together (Tr. 428–429). In the fall of 1952, petitioner, while engaged in distributing political and union leaflets, would stop at Ondrejka's machine and discuss Party affairs (Tr. 430–431).

Ondrejka testified that a Communist Party meeting was held at petitioner's home in February 1953, which was attended by Jerry Rose and Ted Silverstein, the South Side Section Leader and Youth Coordinator, respectively, of the Communist Party in Milwaukee (Tr. 433–434). Rose said that the Party was pleased with the work that petitioner and Ondrejka had been doing for the Party in the Allen-Bradley plant during the previous several months (Tr. 435). He stated, however, that there was a need to coordinate the activity of petitioner and Ondrejka, each of whom had been operating in an individual fashion since they were then working on different shifts (Tr. 435). Rose stated that a new Allen-Bradley Party branch was to be formed to place them under tighter Party direction and guidance (Tr. 435). Rose suggested that petitioner be made chairman of the group because it would be easier for Rose to meet with petitioner (Tr. 435–436). Later in February 1953, petitioner attended a meeting with Ondrejka, Rose, and Silverstein to determine whether the Party should

establish a Labor Youth League group in the Allen-Bradley plant (Tr. 438–440). Petitioner proposed to form such a group, composed of himself, his wife, Ondrejka, and his wife, and at the same time to establish a "broader study group for the preparation of youth in the labor union" at the plant (Tr. 440). Petitioner said that he would introduce a resolution at the next stewards' meeting to establish a study group (Tr. 441). In March 1953, petitioner introduced a resolution at a stewards' meeting to start a labor school for young people in the union (Tr. 443–445).

Ondrejka also testified as to other Party meetings attended by petitioner as a Party member later in 1953. At a meeting in petitioner's home in April 1953, petitioner said that he and his wife pledged $35 to the Party and that, with the pledge of other members of their group, they had raised $80 of their goal of $100 for the annual Party fund drive (Tr. 447–448). Petitioner also discussed other Party business at the same time (Tr. 448–449). In June 1953, petitioner met with Ondrejka at petitioner's home to tell the latter the Party's orders as to strike action at the Allen-Bradley plant (Tr. 450–451). In August 1953, petitioner again met with Ondrejka at petitioner's home and read to Ondrejka the Party's new security regulations (Tr. 452–454).

At the conclusion of Ondrejka's direct testimony, petitioner moved for production of all statements furnished to the F.B.I. by the witness for use by the petitioner in cross-examination (Tr. 455). The court ordered production by the government to the court

in camera of "all statements that in any way affect the direct examination of the witness", so that the court could determine what parts should be deleted because they did not relate to Ondrejka's direct testimony, before the statements were turned over to petitioner (Tr. 459–460). All of the statements of the witness relating to his direct testimony, as excised, were turned over to petitioner (Tr. 464–491). Petitioner then renewed his motion for production of all statements relating to the testimony of the witness without excisions; this motion was denied (Tr. 491). The court also denied petitioner's motion to strike Ondrejka's testimony (Tr. 491).

On cross-examination, Ondrejka testified that he was employed by the F.B.I. from the spring of 1949 to April 1954 (Tr. 499). In the beginning the F.B.I. paid him $25 per month in cash for his services; this monthly payment was increased in November 1949 to $50 and continued at that rate until April 1954 when his connection with the F.B.I. terminated (Tr. 500–501). In addition, Ondrejka was reimbursed by the F.B.I. for expenses such as Communist Party contributions, dues, and travel (Tr. 503, 558), which he reported to an F.B.I. agent, who would write them down on a pad and reimburse him at a later date (Tr. 506). The court sustained an objection to the question whether Ondrejka signed receipts when he was reimbursed for his expenses (Tr. 506–509). Ondrejka estimated that the total paid him by the F.B.I. was $3,000 over the five-year period he was employed, or $600 a year (Tr. 559).

Ondrejka testified that he had furnished reports on petitioner's Communist Party activities to the F.B.I. (Tr. 535–536, 540), and that he had refreshed his recollection by reading about twenty of these statements the Sunday before testifying (Tr. 532–535, 562–563). Some reports to the F.B.I. were made orally to an agent, some in his own handwriting; he never saw the reports written by the agent prior to having his recollection refreshed the preceding Sunday (Tr. 542). One such report was shown to him by petitioner's counsel and he was cross-examined briefly with respect to its contents (Tr. 543–545).

At this point in the cross-examination, petitioner moved for production of all statements of the witness whether handwritten, typewritten, or the result of interviews with agents of the F.B.I. which related to the witness's testimony on cross-examination (Tr. 546–547). He also moved for production of the reports of expenditures for which he received reimbursement from the F.B.I. and the receipts he signed evidencing payment of those expenditures (Tr. 547–548). The government opposed production of documents that did not relate to the direct testimony of the witness. The government objected to the production of Ondrejka's reports of his expenditures and to the production of the receipts on the ground that they were administrative records of the F.B.I. and were immaterial and irrelevant; however, the government offered to produce a schedule of such payments indicating whether they were for services or for expenses (Tr. 551). The court sustained the government's objection and denied petitioner's motion

(Tr. 552–553). The court also denied petitioner's motion to strike all of Ondrejka's testimony on direct and cross-examination (Tr. 554).

Petitioner objected to the instructions to the jury on numerous grounds (see Tr. 713). In particular, he objected to the trial court's definitions of "membership" and "affiliation." The relevant instructions are set forth in the Appendix, *infra*, pp. 61–66.

SUMMARY OF ARGUMENT

I

The receipts signed by the government witnesses were statements within the meaning of 18 U.S.C. 3500 and were not immune from production merely because they are administrative records of the F.B.I. In our view, however, the case should be remanded to the district court to consider whether the receipts were sufficiently related to the witnesses' direct testimony to be producible and, if so, whether this error requires a new trial.

A. The issue concerning the production of the receipts should not be decided by this Court at this time. The case was decided both by the district court and the court of appeals on the basis of factual assumptions which are erroneous. First, petitioner moved for the production of reports made by witness Ondrejka to the F.B.I. concerning his expenses as an informer in the Communist Party. The government failed to tell either the district court or the court of appeals that no such reports existed at the time of trial—the personal notes of the F.B.I. agents who heard the oral reports had been destroyed, in ordinary course, long before the first trial.

Second, and more important, the prosecution indicated to the trial court, and the government argued in the court of appeals, that the receipts signed by Ondrejka did not itemize the nature of his expenses. Thus, the court of appeals (and apparently the district court) decided the issue on the basis that the schedules of amounts and dates of payments to Ondrejka, which the government offered to give petitioner, contained all the information in the receipts. In actual fact, nine of the receipts signed by Ondrejka were itemized and therefore provided some additional information not in the schedule. Since the lower courts did not have the opportunity to consider the case in this posture, we think that it is appropriate for the Court to remand the case for their initial consideration of the itemized receipts.

The government will contend that petitioner's conviction should not be set aside for a new trial, even on the basis of the true facts, because the receipts signed by the two government witnesses were not "related to" their direct testimony as required by 18 U.S.C. 3500 and that, even if they were related, the government's failure to produce constituted harmless error.

These issues are not ripe for determination by this Court. Neither the receipts nor the schedules are in the record or before this Court; yet proper resolution of the questions depends upon detailed examination of these documents. Moreover, the government's contentions involve detailed examination and comparison of the record, the numerous narrative statements of the

two witnesses which were produced, the receipts, and the schedules of payments. This is normally the responsibility of the lower courts, and not of this Court in the first instance.

B. While the case should be remanded to the district court for consideration of petitioner's contentions, this Court should not itself order a new trial. For the government will present in the district court substantial grounds for concluding, after examination of the record and documents, that petitioner is not entitled to a new trial, but that the judgment of conviction should be reinstated.

II

The trial court's instructions to the jury on membership and affiliation were correct.

A. In *Jencks* v. *United States*, 353 U.S. 657, 679, Mr. Justice Burton, in his concurring opinion, found the trial court's charge on the definition of "membership" in a case likewise brought under Section 9(h) of the Taft-Hartley Act to be deficient for failing to emphasize a crucial subjective fact: "the desire of an individual to belong to the organization and a recognition by the organization that it considers him as a member." This element was included in the court's charge in this case, and similar instructions on the definition of membership have been approved by several courts of appeals. *Fisher* v. *United States*, 231 F. 2d 99, 107 (C.A. 9); *Lohman* v. *United States*, 251 F. 2d 951, 954, 266 F. 2d 3 (C.A. 6), certiorari denied, 361 U.S. 923; *Travis* v. *United States*, 269 F. 2d 928,

942–943 (C.A. 10), reversed on other grounds, 364 U.S. 631. This subjective element of mutual acceptance by the member and the organization is the ultimate question for the jury.

2. Although the ultimate determination, contrary to petitioner's contention, is a subjective one, it is proved by objective facts, and therefore the jury should be instructed as to what objective facts evidence membership. The court here properly instructed that the state of mind required for membership can be determined by what an individual says and does. The court further told the jury that it should consider as objective circumstances relevant to membership twelve criteria, such as payment of dues, attendance at Party meetings, subjection to Party discipline, and so forth. These were substantially the criteria set forth in Section 5 of the Communist Control Act of 1954 (50 U.S.C. 844) for determining Communist Party membership. While Section 5 probably does not apply by force of law to Section 9(h) of the Taft-Hartley Act, the criteria of membership thus enunciated by Congress are clearly relevant to a jury's determination of membership in a particular case. Similar criteria in Section 9(h) cases have been repeatedly approved by courts of appeals.

3. The contention that use of the indicia in Section 5 violates due process and allows conviction on the basis of activities protected by the First Amendment is plainly without merit. Section 5 creates no presumptions, and there is a rational connection between the specific criteria and the determination of

membership. And even though some activities which are relevant to proof of membership are perfectly legal in and of themselves, the First Amendment does not preclude their use in evidence for that purpose.

B. If petitioner's conviction is ultimately upheld on the "membership" count of the indictment, there would be no need to consider the instructions on the "affiliation" count, since the prison sentences were made to run concurrently. *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105.

In any event, the court's charge on this point was clearly proper. The jury was told that "affiliated" means "a relationship short of and less than membership" but "more than that of mere sympathy for the aims and objectives" of the Party; and that a person may be found to be affiliated "when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis." This instruction accords with that suggested by Mr. Justice Burton in *Jencks*, 353 U.S. at 679–680, and with this Court's opinion in *Bridges* v. *Wixon*, 326 U.S. 135, as well as with decisions of several courts of appeals. Petitioner's challenges to the charge so widely accepted are unsound.

1. Petitioner claims that "affiliated with" the Communist Party means only membership in an organization affiliated with the Party. Section 9(h), however, requires union officers to swear that they are not "affiliated with such party," *i.e.*, the Communist Party. Thus, the statute itself strongly indicates that the oath is violated by an officer who was affiliated with the Party *either* because he was a member of an organization which itself was affiliated with the Party or because he himself was directly affiliated with the Party. The various opinions in *American Communications Assn.* v. *Douds*, 339 U.S. 382, which, in general terms, described Section 9(h) as applying to members of the Party and affiliated organizations (*id.* at 406, 421, 450), do not preclude this interpretation of the statute.

2. It is, of course, correct that "affiliation" in Section 9(h) does not necessarily have the same meaning as under the deportation laws and that therefore *Bridges* v. *Wixon* does not automatically apply here. On the other hand, the word is used in the two statutes in the same context, *i.e.*, affiliation with the Communist Party, and every court which has considered this issue has held that it has the same basic meaning.

Petitioner claims, however, that, if the definition in *Bridges* v. *Wixon* is applied, First Amendment problems are raised since this Court in *Douds* upheld the affiliation provision in Section 9(h) only because of the likelihood that members of the Communist Party would engage in political strikes, and a person could be affiliated with the Party by merely allying with the Party to achieve a socialist state without adopting its

methods. However, the decision in *Bridges* and the instructions here require proof that the Party could rely on its affiliate on a reasonably permanent basis and Congress was justified in concluding that a person who could be relied on by the Party on such a basis would probably use the political strike.

3. Petitioner claims that the instruction is inconsistent with this Court's requirement in *Bridges* that the affiliation must be of a quality "which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities." But this part of the definition in *Bridges* clearly does not apply to cases under Section 9(h). The statute in *Bridges* related to deportability of aliens affiliated with organizations advocating overthrow of the government by force, whereas the purpose of Section 9(h) was to prevent members or affiliates of the Communist Party from using their position as labor leaders to interrupt interstate commerce by calling political strikes. It would make no difference that the intent of the union leader in using political strikes was to further only legal Party objectives, especially since the Party, in calling on the union leader who was its permanent ally, might well be using the strike for ultimately illegal purposes of its own.

4. While portions of the court's charge on affiliation were conflicting, petitioner was not prejudiced because there was no confusion which could have prejudiced petitioner. The net effect was to put a heavier burden of proof on the government than the law requires.

ARGUMENT

I

THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR CONSIDERATION WHETHER THE GOVERNMENT'S FAILURE TO PRODUCE RECEIPTS GIVEN TO THE F.B.I. BY GOVERNMENT WITNESSES CONSTITUTED ERROR AND, IF SO, WHETHER THIS ERROR REQUIRES A NEW TRIAL

Two government witnesses, Sullivan and Ondrejka, who identified petitioner as a Party member, testified on direct examination that they themselves joined the Party at the request of the F.B.I. (Tr. 368, 408–409). On cross-examination, they testified that they were paid by the F.B.I. for their services and were also reimbursed for expenses incurred in connection with Party activity (see *supra*, pp. 7, 11). Sullivan testified that when he was paid for his services, he gave the F.B.I. agent a signed receipt (Tr. 373). Ondrejka testified that he reported his expenses to an F.B.I. agent who wrote them down (Tr. 506). The court sustained an objection to a question seeking to ascertain whether Ondrejka had signed receipts when he received reimbursement from the F.B.I. (Tr. 506–509). For this reason and because we know that Ondrejka in fact signed the receipts, we will consider this issue as if it had been established that receipts were signed by Ondrejka.

Petitioner moved on three occasions for the production of the entire content of all statements made by Sullivan to the F.B.I. (Tr. 330, 352, 398). The first two motions asked for statements relating to Sullivan's testimony and the last asked for all his statements without limitation. The court ordered the gov-

ernment to produce all the statements which were related to Sullivan's direct testimony (Tr. 332). The government stated that it had produced for the court's inspection in camera all of Sullivan's statements relating to his direct testimony, and the court gave these statements to petitioner except for the portions which it excised because they were not so related (Tr. 331–332, 351). Petitioner did not specifically request production of the receipts Sullivan signed for the payments made to him by the F.B.I.

Petitioner moved for the production of all statements made by Ondrejka to the F.B.I. without any exceptions (Tr. 455, 491). Again, the court ordered the government to produce all statements furnished the F.B.I. by Ondrejka which related to his direct testimony and deleted those portions of the statements which did not so relate (Tr. 459–460). Petitioner also moved for Ondrejka's reports to the F.B.I. of his expenditures for Party purposes and the receipts he signed when reimbursed for these payments (Tr. 547–548). The government objected to the latter motion on the grounds that the statements sought were too remote and unrelated to the issues, and were administrative documents, but offered to give petitioner a schedule of the payments made to Ondrejka for expenses and services (Tr. 550–551). Petitioner's counsel asked the Assistant United States Attorney whether the schedule contained "the items for which reimbursement was made" and was told, "I do not believe that they do, and it is my impression that neither do the receipts. I know that the schedule contains the dates of payments and the amounts * * *

from the beginning to the end. * * * And states whether or not the payments were for services or for expenses" (Tr. 551–552). When petitioner's counsel refused the tender of the schedule, the court denied the motion (Tr. 552).

Petitioner claims (Pet. Br. 8–11) that the trial court erred in refusing to order the production of reports of their expenses made by witnesses Sullivan and Ondrejka to the F.B.I. and the receipts which they signed and gave the F.B.I. when they were reimbursed for their expenses. This is the only issue respecting the production of documents which is before the Court; certiorari was denied as to the other production questions raised by petitioner. 365 U.S. 810.

A. THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT

We agree that the receipts signed by the witnesses were statements within the meaning of 18 U.S.C. 3500. While they contained extremely little information, they do, expressly or impliedly, state certain facts. Furthermore, there is no merit to the argument that the receipts signed by the witnesses were immune from an order requiring their production because they were administrative records of the F.B.I., which was one ground for the government's opposition to production in the district court. Their administrative character gave them no special immunity. The question remains, however, whether the assertions are sufficiently related to the subject matter of the witnesses' testimony and whether any portions should be excised. Also, where production has been refused, there is a potential question whether any error was harmless be-

cause the identical information had otherwise been supplied.

We submit that in the present case these issues concerning the production of receipts should not be decided at this time by this Court, but that the questions should be remanded to the district court for its consideration. One reason for this disposition is that the case was decided both by the district court and the court of appeals on factual assumptions which are actually erroneous. Those courts have never had the opportunity to consider the true issue in this case. Moreover, resolution of this issue requires detailed examination of both the record and the various statements made by the government witnesses, many of which are not now even in the record in any form—a responsibility which can be handled most appropriately, at least in the first instance, by the district court.

1. Petitioner's motion with regard to Ondrejka asked for the reports of his expenses made by Ondrejka to the F.B.I. This motion was based on Ondrejka's testimony that he had made such oral reports and an F.B.I. agent immediately wrote them down. Thus, the reports could come within the meaning of "statement" as defined by 18 U.S.C. 3500(e)(2)—"a stenographic * * * recording * * * which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." The Assistant United States Attorney responded to the motion by claiming that the reports and receipts were remote, and were ad-

ministrative documents, thus implying that such written reports existed. And the district court denied the motion on this basis.

In fact, we have been informed by the F.B.I. agents involved that no such written reports exist today nor did they exist at the time of either trial. The agents, we are told, merely made handwritten personal notes of the amounts spent by Ondrejka for expenses, which they transcribed to the receipts later signed by Ondrejka when he received reimbursement. The personal notes were destroyed immediately in the normal course of operation.[4]

We do not believe that the legal issue of production on which this Court has granted certiorari should be considered as if it actually involved documents which we now know do not and did not exist, and which therefore could not possibly have been produced. On the other hand, since Ondrejka testified that a written record was made of his oral reports, petitioner has the right not to accept the government's representations in this brief that the personal notes of the F.B.I. agent were destroyed long before trial and in the normal course of operations. He should have the opportunity, if he desires, to have either his counsel or the court question the responsible government officials if they are available. See *Campbell* v. *United States*, 365 U.S. 85. This procedure, of course, can be followed only in the district court.

2. More important, the prosecutor indicated in the district court that the receipts signed by Ondrejka—

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[4] It should be noted that these events occurred before *Jencks* v. *United States*, 353 U.S. 657, was decided by this Court.

which do exist—did not itemize the expenses for which Ondrejka was reimbursed. See *supra*, p. 11. The receipts were not shown to the district court at any time. Accordingly when the government offered to produce a schedule of the dates and amounts of payment, it appeared to the trial court that the schedule provided the identical information the receipts would provide if they were produced. It was apparently for this reason, at least in part, that the trial court denied petitioner's motion for production of the receipts.

In the court of appeals, the government's brief, citing the statement made by the Assistant United States Attorney to the trial court, said (p. 41, note 14) that "[t]he actual receipts do not contain a schedule of the purposes for which reimbursement was made but merely the total that was paid (Tr. 551)."* Consequently, the government argued (p. 41) that "[t]he schedule of payments would provide the defense with the information that he sought without requiring the Government to comply with the difficult, time-consuming, and wholly unnecessary task of producing a receipt for every payment made to the witness over a period of five years, which would not give the defendant any more information than the other method." The court of appeals adopted the government's representation concerning the content of the receipts, in stating that "the government has offered to supply the defendant * * * with a sched-

*The receipts were not before the court of appeals in any form.

ule of all information which the requested documents contained" (Pet. App. 52).

In actual fact, the statements made to the district court and in the government's brief in the court of appeals were inadvertently erroneous. A more detailed study of the receipts than was made during the brief colloquy at the trial would have revealed that nine of the receipts, beginning in 1950 and ending in 1953, apparently identified a few occasions or items of expense and the amounts.[1] Thus, certain of the receipts contained some additional information not provided in the schedule offered petitioner by the government. The district court and court of appeals never had the opportunity to consider the case in this posture and we therefore think that it is appropriate for the Court to remand the case for their redetermination of the issue of production of the receipts.

3. As we discuss below (pp. 27–36), the government's reasons for contending that petitioner's conviction should not be reversed for a new trial are (a) that the receipts given by Sullivan and Ondrejka to the F.B.I. were not "related to" their direct testimony as required by 18 U.S.C. 3500 and (b) that, even if they

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[1] For example, one receipt contains the following itemization covering the period from November 9, 1950, to Februar, 9, 1951:

Daily Worker & Sunday Worker	8.50
Foster Book	3.00
Bobrowicz meeting	5.00
LYL party	3.50
LYL party	3.00
Miscellaneous literature	2.00
	$25.00

were related, the government's failure to produce them would constitute harmless error. The former contention involves comparing the receipts signed by the witnesses with their lengthy direct testimony. The contention as to harmless error requires a comparison of the receipts with the narrative statements of the two witnesses which the government gave petitioner, as well as with the schedules of payment which the government offered to produce with regard to Ondrejka, and would have offered to produce with regard to Sullivan (see *infra*, p. 32) if petitioner had made a specific motion asking for the receipts. Such detailed examination and comparison of the evidence and various statements are normally the responsibility of the district court and the court of appeals. It is particularly inappropriate that this Court become involved in this task in this case since neither the receipts (which are 124 in number) nor the schedules of payments are part of the record or otherwise before the Court.

If the district court should determine, on remand, that there was no error in the refusal to produce the documents or that the error was not prejudicial, then it would reinstate the judgment of conviction; petitioner would, of course, have the right of appeal to the court of appeals and to petition this Court on certiorari. However, if the district court ruled otherwise, it would order a new trial.

B. THIS COURT SHOULD NOT ORDER A NEW TRIAL

In this section we summarize the contentions which the government will present in the district

court—that the government's failure to produce was correct since the receipts were not "related to" the witnesses' direct testimony and that, even if the ruling were erroneous, it was harmless error. We present these contentions—which we will urge upon the district court and which we believe will demonstrate that petitioner is not entitled to a new trial—not in an attempt to persuade this Court that the judgment below should be affirmed but to show that this Court should not order a new trial at this time because the government has a substantial case to present which merits the hearing suggested.

1. *The receipts signed by Sullivan.*—Sullivan testified on direct examination merely that he joined the Communist Party at the request of the F.B.I. Not until cross-examination did he indicate in any way that he was paid by the F.B.I. for his services or was reimbursed for expenses. Thus, we will argue before the district court that the receipts signed by Sullivan—which we will show, on remand, contained absolutely no itemization of the nature of the expenses (unlike some of Ondrejka's)—were not "related to" Sullivan's direct testimony.

Even if the receipts were "related to" Sullivan's direct testimony in some distant manner because they suggested his self-interest in testifying against petitioner, they were extremely remote. As the court of appeals said, "We do not believe the statute requires the court to explore every time-consuming, collateral alley which the court can devise in a particular case and which bears no direct relationship to the witness'

direct testimony" (Pet. App. 52). In our view, the court of appeals was correct that the trial court has considerable discretion in determining whether to order production of such remote statements, which do not deal with the subject matter of his direct testimony but bear only upon his bias or interest as a witness. Otherwise, trial courts would often be burdened with remote and useless statements—many of which would have to be examined in detail to determine what parts should be excised—because they related in this distant fashion to the witness's direct examination.[8] This is the same kind and degree of discretion that a trial court is allowed in controlling cross-examination for bias or interest.

We will contend before the district court that the trial court here had discretion to refuse production of these receipts. The receipts were part of an effort to impeach the witness by showing his monetary self-interest. The witness had already admitted that he was paid substantial sums for his services; the fact that he was reimbursed for his expenses, which he had also admitted, could not significantly change the witness's position. The trial court could certainly in these circumstances control further cross-examination

[8] For example, if a witness testifies on direct examination that he has been an F.B.I. agent or informant for ten years, every statement he has ever submitted to the F.B.I. relates in some distant fashion to his direct testimony since it shows he was an agent or informant at that time—and if there are no statements near the beginning or end of the ten years or substantial lapses in the middle this conceivably might be used to cross-examine the witness as to whether he actually served during the entire period.

on this collateral issue which did not directly involve petitioner's guilt or innocence and which had been fully covered. See *Glasser* v. *United States*, 315 U.S. 60, 83; *United States* v. *Clawans*, 300 U.S. 617; *Alford* v. *United States*, 282 U.S. 687, 694; *Storm* v. *United States*, 94 U.S. 76, 84–85; *United States* v. *Ball*, 163 U.S. 662.* By sustaining government objections to further questions seeking additional details of the payments (Tr. 506–509), the trial court indicated that the subject was sufficiently covered. Since cross-examination could have been and apparently was ended on the matter, we will contend that the trial court was not required by the statute to order production of statements concerning only this issue which was no longer to be developed. And, even if production was technically required by the statute, it could not help petitioner and was therefore harmless error.

In any event, we shall argue that petitioner failed with regard to Sullivan to make sufficiently clear to the trial court and the government that he was requesting the receipts as well as the narrative statements which are normally the subject of motions

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* In the *Ball* case, two material witnesses for the prosecution were asked on cross-examination whether they had at their own expense employed another attorney to assist the District Attorney in prosecuting the case. They frankly admitted doing so. This Court held that the ensuing question, "How much did you pay him?" might properly be excluded by the trial judge as immaterial. The case is thus support for the proposition that once a witness whose credibility is the subject of cross-examination admits a bias or prejudice or personal interest in favor of the prosecution or against the accused, the trial court may, in its discretion, preclude further questions on the subject.

made under 18 U.S.C. 3500. The only requests made by petitioner for the production of statements made by Sullivan to the F.B.I. called for the production of all such statements or at least all statements related to Sullivan's direct testimony. The government told the trial court that it would and did produce all of Sullivan's statements which related to his direct testimony, as 18 U.S.C. 3500 requires (Tr. 331–332, 351). Even though petitioner knew from Sullivan's testimony that Sullivan had given signed receipts to the F.B.I. when he was paid by the F.B.I. (Tr. 373), petitioner did not claim, unlike his position with respect to the receipts signed by Ondrejka, that these receipts came within 18 U.S.C. 3500.

In these circumstances, we will contend that petitioner cannot claim for the first time on appeal that the government should have produced the receipts. Petitioner knew at the time of trial that the receipts existed, that the government was purporting to produce all statements related to the direct testimony, and that nevertheless the government was not producing the receipts. In some situations, a defendant may not know the kinds of documents which the government may have but does not produce, and therefore cannot be required to specify those he wants produced. But this petitioner knew about the receipts and, in the circumstances of this case, it was his responsibility to ask specifically for them so as to notify the government that he was claiming that they should be produced along with the narrative statements.

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If petitioner had made a specific motion, we will show (on remand) that the government stood ready to submit a list of all the money, both for services and expenses, with the appropriate dates, paid by the F.B.I. to Sullivan. This list would have given petitioner all the information he could have obtained by production of the receipts, since, unlike the receipts signed by Ondrejka, none of Sullivan's receipts itemized his expenses. Thus, we will contend that even if petitioner had specified that he wanted production of the receipts—as was his responsibility—the government's failure to produce would clearly have been harmless error.

2. *The receipts signed by Ondrejka.*—a. Insofar as the receipts signed by Ondrejka do not itemize Ondrejka's expenses—and all but nine do not—the issue stands in virtually the same position as on Sullivan's receipts. We will argue on remand that they were entirely unrelated to Ondrejka's direct testimony and, even if they are considered to have some distant indirect connection, it was within the discretion of the trial court to refuse to order their production.

The only significant difference between the un-itemized receipts of Ondrejka and those of Sullivan is that petitioner made a specific motion for the production of Ondrejka's. This motion resulted in an offer by the government to produce a schedule giving the dates and amounts of payments made to Ondrejka not only for expenses but for his services. We will show on remand that this schedule, as the court of appeals held, would have provided petitioner with the identi-

cal information contained in the un-itemized receipts. Thus, even if the government should properly have produced these receipts, its failure to do so was harmless error.

b. The nine itemized receipts did state a small amount of information which was not contained in the schedule offered petitioner by the government (for an example of such a receipt, see *supra*, p. 25, note 7). They suggest that Ondrejka attended certain Party meetings and picnics, bought certain Party literature, and made certain contributions. Only two receipts contain even a remote reference to anything to which Ondrejka testified on direct examination. One receipt states Ondrejka's expenses as $3.50 and $3 for two L.Y.L. (Labor Youth League) parties sometime between November 9, 1950, and February 9, 1951. Ondrejka testified on direct examination that he first met petitioner at L.Y.L. meetings in January and February 1951 (Tr. 415). However, Ondrejka's detailed written reports to the F.B.I concerning these meetings were turned over to the defense at the conclusion of the direct examination. The brief notation in the receipt could not have conceivably provided petitioner any additional information. Thus, we will contend that the failure to produce this receipt showing these two meetings—the other notations on the receipt would properly have been excised as not related to Ondrejka's direct testimony—was, if error at all, harmless.

One other receipt in 1953 contains the notation "Party Fund Drive—$30.00." Ondrejka testified on

direct examination that at a meeting on April 17, 1953, petitioner reported that the quota for the Allen-Bradley branch of the Party for the Party's annual Fund drive was $100 of which $80 had been pledged as of that time, including $20 pledged by Ondrejka. Ondrejka's report to the F.B.I. concerning this meeting was furnished to the defense at the trial (stating the total pledged was $100, but giving no figures as to individual pledges), as were two other statements of Ondrejka describing petitioner's later efforts to have the members increase their financial support to the Fund drive. We will urge upon the district court that the extremely small amount of information contained in the receipt is of little, if any, significance, since it concerns the collateral issue of the witness's pay from the F.B.I. The important thing is that Ondrejka admitted that he was paid substantial amounts of money for his services and was also reimbursed for expenses. The lack of importance of this matter is shown by the fact that petitioner did not even make an attempt to use the narrative statements for cross-examination.

We will argue also that the other items on the receipts were not related to Ondrejka's direct testimony. He never mentioned the meetings, literature, or contributions suggested in these receipts. Conceivably, it could be said that Ondrejka's failure to testify that petitioner was at certain Communist Party or front meetings that Ondrejka attended could be used to cross-examine Ondrejka in order to show that petitioner did not attend some or even many meetings in the Milwaukee area that most other Party members attended and were expected to attend. Thus, possibly

an attempt could be made to develop the defense that petitioner merely attended occasional Party meetings—perhaps from curiosity, perhaps from ideologic sympathy, perhaps because union business was being discussed—and that he was never actually a Party member. We do not agree that this bare possibility should lead to production of the receipts, and intend so to argue on remand.

First, we will contend that the connection between Party meetings apparently attended by Ondrejka but not mentioned in his direct examination, on the one hand, and Ondrejka's actual direct testimony, on the other, is so distant that it is not properly "related to" his direct testimony under 18 U.S.C. 3500. *Lohman* v. *United States*, 266 F. 2d 3, 5 (C.A. 6), certiorari denied, 361 U.S. 923.[10] At the least, we believe that the relationship is sufficiently distant so that petitioner was required to indicate to the trial court that the itemized expenses were necessary to defense upon which he was going to rely. Here, petitioner never even suggested that his defense was that, while he attended a few Communist Party and front meetings, he did not attend many others. If this had been his theory, he would have argued that he was entitled to production of the particular narrative statements of Ondrejka, as well as Sullivan, describing other Communist meetings in and around Milwaukee. From the contents of and excisions from the narrative state-

[10] The fact that this same issue was before the court of appeals cannot be ascertained from that court's opinion. See, however, the record in No. 268, Oct. Term 1959, pp. 210–217, 288–289.

ments produced by the government, it was clear that the government and the trial court regarded descriptions of meetings not described by the witness on direct examination as unrelated to the direct testimony. (See, *e.g.*, Tr. 243–244). Certainly petitioner could readily surmise that some such descriptions existed in the reports since Ondrejka, for example, testified concerning only some ten meetings, and obviously had attended more than that number. Nevertheless, petitioner merely claimed that he was entitled to all of Sullivan's and Ondrejka's statements to the F.B.I. whether related to their testimony or not (an issue which is now foreclosed by the limitation of certiorari). Moreover, petitioner's counsel never asked questions on cross-examination concerning whether Sullivan or Ondrejka attended many other meetings from which petitioner was absent.

Second, even if we are wrong and the itemized receipts were related to Ondrejka's direct testimony under 18 U.S.C. 3500, we will contend below that the failure to produce these nine receipts is not ground for a new trial. Petitioner has never even indicated in the trial court, the court of appeals, or this Court how the existence of meetings attended by Ondrejka, but not mentioned in his direct testimony, would be used by the defense. Indeed, petitioner did not base his defense on any theory which could have used this information. Thus, the production of the itemized receipts could not have affected the outcome of the trial and the government's failure to produce them was harmless error, if error at all.

As we have just indicated, we will argue to the trial court (if a remand is ordered) that the failure to produce the receipts did not constitute prejudicial error, or error at all, and that a new trial should not be granted. We do not ask this Court to pass upon the merit of these arguments and affirm the conviction on the present record. While that record does not contain in any form either the receipts or the schedules of payments which the government offered to furnish (but which petitioner refused), their consideration is necessary to the disposition of the question on which the Court granted certiorari. Neither court below could give proper consideration to these documents because the government inadvertently misinformed both courts that Ondrejka's receipts (which neither court saw) were not itemized. This Court is not the appropriate forum to consider in the first instance the lengthy record and large number of documents involved, especially since it has before it neither the receipts nor the schedules. Accordingly, it seems more appropriate to remand the issue to the trial court which can determine, after consideration of the documents and argument, whether a new trial should be ordered or the judgment of conviction reinstated; in the latter event, the petitioner would, of course, have the right to appeal to the court of appeals.[11]

[11] As suggested above (pp. 23–24), a remand for a hearing is also appropriate in view of the information we have received that there do not exist (and did not exist at the time of the trials) any reports (other than the receipts) of Ondrejka's expenses and the payments made to him.

II

THE TRIAL COURT'S INSTRUCTIONS TO THE JURY ON "MEMBERSHIP" AND "AFFILIATION" WERE CORRECT

If this Court, as we suggested above, remands the case to the district court for consideration of the issue concerning the production of reports and receipts of Sullivan's and Ondrejka's expenses, it would not be strictly necessary for the Court to pass at this time on the instructions to the jury. But we believe that it would be appropriate to do so. On the one hand, the trial court, on remand, may possibly decide that the failure to produce constituted error requiring a new trial. In that event, the court would presumably give the same or similar instructions, particularly since they have been approved by the court of appeals, and if petitioner were convicted, this issue would in all likelihood come to this Court again. If this Court disagreed with the instruction, a fourth trial would be necessary (two have already occurred). On the other hand, the trial court, on remand, may decide that no error occurred in connection with the demand for the receipts (or that any error was harmless) and reinstate the judgment of conviction. Petitioner would then have a right of further review. The court of appeals has already passed upon the instructions on "membership" and "affiliation," and this Court has indicated, by granting certiorari on this issue, that it is worthy of further review. Thus, if the conviction is sustained by the trial court on remand, review after the remand would be

shortened if the Court were now to decide this question. A third possibility is a ruling by this Court that error in the instructions required a new trial, which would moot the production issue and render superfluous the hearing on remand which we have suggested.

In these circumstances, the Court may well wish, since the issue is properly presented at this time, to consider the instructions and avoid the possibility of further, long delay.

Petitioner contends (Pet. Br. 11–32) that the trial court erroneously defined the meaning of "membership" in, and "affiliation" with, the Communist Party.[12] The instruction given, however, was obviously modeled on that suggested for cases arising under Section 9(h) by the concurring opinion of Mr. Justice Burton in *Jencks* v. *United States,* 353 U.S. 657, 678, 679.[13] We submit that this instruction correctly and clearly defined for the jury the elements of the offense charged.

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[12] These two instructions are set forth in full below at pp. 62–65 and 61–62, respectively.

[13] This opinion was joined by Mr. Justice Harlan and, as to this issue, by Mr. Justice Frankfurter (see 353 U.S. at 672). Mr. Justice Clark, in his dissenting opinion, stated that the instructions given in *Jencks* were sufficient (*id.* at 683–684); *a fortiori*, the more detailed instructions presented by Mr. Justice Burton were also sufficient. The majority opinion did not find it necessary to reach the issue of instructions (*id.* at 659, note 6) since it held that the case must be reversed because of the failure of the trial court to order the government to produce certain documents.

A. THE MEANING OF "MEMBERSHIP"

Petitioner contends that the trial court's instruction on membership was erroneous because (1) it defined membership in subjective terms as a state of mind rather than stating its overt objective components (Pet. Br. 12–16); (2) it failed to state precisely what objective circumstances should be considered in determining membership since the criteria of membership provided in Section 5 of the Communist Control Act, which the trial court substantially stated, are too indefinite to give the jury the necessary guidance; and (3) use of the indicia of membership in Section 5 was unconstitutional (Pet. Br. 16–21).

1. The trial court's definition of membership was almost verbatim the same instruction formulated by Mr. Justice Burton in *Jencks* v. *United States, supra.* The trial court in *Jencks* charged the jury (353 U.S. at 679):

> In considering whether or not the defendant was a member of the Communist Party, you may consider circumstantial evidence, as well as direct. You may consider whether or not he attended Communist Party meetings, whether or not he held an office in the Communist Party, whether or not he engaged in other conduct consistent only with membership in the Communist Party and all other evidence * * *.

Despite this specification of particular objective facts as evidencing Party membership, Mr. Justice Burton found the charge deficient because it failed

to require the jury to find a crucial subjective fact; it "failed to emphasize to the jury the essential element of membership in an organized group—the desire of an individual to belong to the organization and a recognition by the organization that it considers him as a member" (*ibid.*). In almost precisely the same language, the trial court in the instant case charged (Tr. 704; *infra*, p. 63):

> Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those persons who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member.

Similar instructions have also been approved by several courts of appeals in cases arising under Section 9(h). In *Fisher* v. *United States*, 231 F. 2d 99, 107, the Ninth Circuit held that "[m]embership is composed of a desire on the part of the person in question to belong to an organization and acceptance by the organization." In *Lohman* v. *United States*, 251 F. 2d 951, 954, the Sixth Circuit stated that "[m]embership should be so defined as to emphasize to the jury the necessity of finding that the appellant desired to belong to the Communist Party, and that the Communist Party recognized that it considered him as a member." On retrial this language was included in the trial court's instruction and the court

of appeals approved the instructions given. *Lohman* v. *United States*, 266 F. 2d 3 (C.A. 6), certiorari denied, 361 U.S. 923. In *Travis* v. *United States*, 269 F. 2d 928, 942–943, reversed on other grounds, 364 U.S. 631, the Tenth Circuit approved the identical instruction given in this case (quoted above) because it "emphasized the primary element of membership as suggested by Mr. Justice Burton in *Jencks* v. *United States* * * * and included the idea of the continuing reciprocal relationship necessary for that status." [14]

Thus, the courts have consistently held in cases decided under Section 9(h) that membership in the Communist Party is a mutually consensual relationship. This necessarily means, contrary to petitioner's contention, that the ultimate determination to be made by the jury concerns the state of mind of the alleged member and the attitude of the Party toward him.

2. Even though the ultimate determination is a subjective one, it is of course true that the jury can reach its conclusion only on the basis of the evidence submitted to it concerning objective facts. There-

[14] Petitioner relies heavily (Pet. Br. 12–13) on the statements in *American Communications Assn.* v. *Douds*, 339 U.S. 382, 410–411, that "[i]n proving that one swore falsely that he is not a Communist, the act of joining the Party is crucial." The definitions of membership provided in Mr. Justice Burton's opinion in *Jencks* and in the Ninth Circuit's opinion in *Fisher*, which were followed in this case, state specifically what it means to join an organization generally and the Communist Party in particular. In other words, the act of joining is proven by the evidence of membership.

fore, it is essential that the jury be instructed as to what objective acts evidence membership. Otherwise, the jury would be left free to guess from the mass of evidence concerning the defendant's conduct whether he was a member.

The instructions to the jury fulfilled this requirement. First, the court correctly stated that the jury must base its determination on objective facts offered as evidence (Tr. 704–705, *infra*, pp. 63–64):

> Intent is a state of mind and can only be determined by what an individual says and what he does. In determining the issue as to whether the defendant was or was not a member of the Communist Party at the time alleged in the indictment, you may take into consideration the acts and statements of this defendant, as disclosed by the evidence, bearing in mind that individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the Communist Party are not in themselves conclusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in this case.

Then, the court told the jury that it should consider as objective circumstances relevant to membership twelve criteria—such as payment of dues, attendance at meetings, subjection to Party discipline, actions on behalf of the Party, and willingness to carry out Party plans (Tr. 705–706, infra, pp. 64–65)—which are substantially the criteria provided in Section 5 of the Communist Control Act of 1954 (50 U.S.C. 844)

for determining Communist Party membership. While Section 5 probably does not apply by force of law to Section 9(h) of the Taft-Hartley Act,[18] it does indicate what the Congress believes to be the components of membership in the Communist Party. Certainly, the trial court's instruction to the jury on this basis was not erroneous.

The same or similar criteria have been repeatedly approved by other courts for use in determining membership in the Communist Party. In *Jencks* v. *United States, supra,* the trial court instructed the jury to consider whether the defendant had attended Party meetings, held office, engaged in other conduct consistent only with membership, and all other evidence (quoted *supra,* p. 28). While Mr. Justice Burton found the instructions erroneous because they failed to emphasize the subjective element of membership, he did not disapprove of these criteria as properly bearing on the issue. In this case, the trial court likewise instructed the jury to consider whether

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[18] Apparently, Section 5 applies only to criminal prosecutions brought under Section 15(a)(2) of the Subversive Activities Control Act (50 U.S.C. 794) against individual members who fail to register in those limited situations where individual members are required to register personally. If, however, Section 5 does apply to prosecution under Section 9(h), the failure of the trial court to instruct the jury precisely in these terms is no ground for reversal. For the instructions were substantially the same as Section 5 and the major differences reflected lack of evidence concerning certain criteria making instructions on them unnecessary (see *infra,* p. 50, note 17). Moreover, petitioner did not object to the failure of the trial court to adhere more closely to Section 5, since his proposed instructions would have omitted use of the criteria in Section 5 altogether (Tr. 586, 606–608).

petitioner had attended Party meetings and other Party gatherings (criterion number 2), whether he had been accepted as an officer or member of the Party (criterion number 7), whether he had subjected himself to Party discipline (criterion number 3), and all other evidence.

Similarly, in *Hupman* v. *United States*, 219 F. 2d 243 (C.A. 6), certiorari denied, 349 U.S. 953, the jury was told that it could consider in determining whether or not the defendant was a member of the Communist Party (see record filed with this Court, No. 764, Oct. Term 1954, p. 615a) whether he attended Party meetings (criterion number 2 in this case); whether he paid money to the Party (criterion number 1); whether he took instruction from Party leaders (criteria numbers 3 and 5); whether he took part in the distribution of Party literature (compare criteria numbers 4, 6, 9, and 12); and whether there was other evidence bearing on this issue. These instructions were approved by the court of appeals. 219 F. 2d at 249. In *Fisher* v. *United States, supra*, 231 F. 2d at 107, the Ninth Circuit stated that membership required proof of actions "such as paying dues, attending meetings and doing some of the work of the group." And then the court of appeals went on to state (*ibid.*):

> Congress in the Communist Control Act of 1954 indicates thirteen types of evidence which a jury may consider to determine the question of membership. * * * Analyzed carefully they break down into acts of the individual indicating a desire to belong, acts of

> acceptance by the organization, and various contributions of funds or services to the organization.
>
> • • • The jury should have been reminded of the components of the term membership rather than be supplied with synonyms.

The Tenth Circuit in *Travis* v. *United States*, 247 F. 2d 130, 135, approved the holding in *Fisher* that the trial court *must* define the components of membership by stating the criteria stated in Section 5. On retrial such instructions were given in virtually the precise language of the trial court in the instant case, and this use of the criteria of Section 5 was again specifically approved by the court of appeals. *Travis* v. *United States*, *supra*, 269 F. 2d at 942–943.

Petitioner suggests (Pet. Br. 19) that the statutory criteria as given to the jury would allow a finding of guilt on the basis of past membership alone, *i.e.*, prior to the date of the affidavit. But this contention fails to consider the evidence which was actually introduced in this case. The evidence showed that petitioner was introduced as a Party member at a meeting in the fall of 1949 and was active in the Party until the fall of 1952 or spring of 1953. On at least eight different occasions, the court admonished the jury to consider *all* the evidence—both pre-affidavit and post-affidavit—that was adduced at the trial (Tr. 673–674, 680, 683, 685, 704, 707, 708). Moreover, the court repeatedly emphasized to the jury the importance of either convicting or acquitting the petitioner on the basis of ascertaining his status with the Communist Party on the date he

executed his affidavit (Tr. 702, 703, 707). Thus, it is clear that the jury found that petitioner was a member of the Communist Party on the date of his affidavit on the basis of evidence concerning events immediately before and immediately after that date.

3. Petitioner and especially the *amici curiae* contend that use of the indicia in Section 5 is unconstitutional for two reasons: First, it violated due process by allowing the jury to base petitioner's conviction on evidence which has no rational relation to guilt (Pet. Br. 19; *Amici* Br. 16–21). And second, it violated the First Amendment by allowing the jury to base petitioner's conviction on statements and acts which are protected by the Amendment (Pet. Br. 7, 17–18, 20–21; *Amici* Br. 21–22). We submit that these contentions are plainly without merit.

As to the claim that use of the criteria in Section 5 violates due process, it is clear that both Section 5 and the instructions given in this case created no presumptions. Instead, they merely state that the jury can consider certain acts of the defendant,[16] as well as other evidence, as bearing on the issue of membership. The decisions of this Court in *Tot* v. *United States,* 319 U.S. 463, and *Morissette* v. *United States,* 342 U.S. 246, which are relied upon by the *amici* (*Amici* Br. 17, 20–21), are therefore not in point.

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[16] Section 5 states that "the jury, under instructions from the court, shall consider evidence, if presented, as to whether the accused person * * *." The trial court here instructed the jury that "you may take into consideration whether the defendant * * *" (Tr. 705, *infra*, p. 64).

Moreover, there is obviously a rational connection between the various criteria stated in Section 5 and membership in the Communist Party. Payment of dues, attendance at meetings, subjection to the organization's discipline, execution of orders, etc., tend to show by common experience that a person is a member of an organization. Of course, if a person only went to a few meetings or occasionally participated in Party activities he might well not be a Party member. But this does not mean that the amount of such activity on behalf of the Party should not be considered by the jury. Indeed, it is difficult to understand how the government can prove a person is a Party member—particularly since the Party has generally attempted to conceal its membership—if evidence of this type cannot be introduced by the government and considered by the jury. And if it can properly be introduced and considered, it was proper for the trial court to instruct the jury to this effect.

It is of course true, as petitioner and the *amici* contend, that Section 5 allows a jury to determine that a person is a member of the Communist Party on the basis of acts and statements which are, in themselves, protected by the First Amendment. But this is hardly strange, since many of the activities of the Communist Party are legal. *American Communications Assn.* v. *Douds, supra,* makes it clear—in upholding Section 9(h) against a claim that it violated the First Amendment—that Section 9(h) does not make such acts or statements criminal, nor does it even prohibit membership in the Communist Party.

Section 9(h) prevents unions which select Party members as their officers from using the facilities of the National Labor Relations Board. It is Party membership which is critical, not the content of the officer's statements or acts. Furthermore, the crime of which petitioner was convicted is giving a false affidavit denying membership in the Communist Party—not the membership or acts and declarations. There is nothing extraordinary in using as evidence of a crime proof of acts and declarations which would be constitutionally privileged standing by themselves. Certainly, neither the First Amendment nor any other constitutional provision gave petitioner the privilege of making false affidavits. That is the only offense with which he is charged.

The *amici* brief also contends (*Amici* Br. 22–26) that, even if Section 5 is constitutional, its application to this case is nevertheless unconstitutional. Counsel reasons that the circumstances of this case required the trial court to give various additional instructions and either not give or modify certain of the instructions in Section 5. The short answer is that in the trial court petitioner asked for none of these relatively small changes. Instead, he objected to the definition of membership in its entirety and asked that his own instructions be given, which completely omitted the criteria of membership in Section 5 (Tr. 586, 606–608). Thus, the objections raised by the *amici* were not stated "distinctly" as required by Rule 30 of the Federal Rules of Criminal Procedure. While it is possible that the instructions suggested by the *amici* would, to some degree, be an improve-

ment—and therefore it may be proper for a trial court to give them in an appropriate case—the instructions given were sufficient. At the very least, the instructions were not so plainly erroneous that they may be reversed on appeal on the basis of an objection not adequately raised before the trial court.[17]

B. THE MEANING OF "AFFILIATION"

If petitioner's conviction is upheld on Count I, the membership count, there would normally be no need for this Court to consider whether the trial court's instruction to the jury on Count II, the affiliation count, was correct. Petitioner received a sentence of three years on Count II to be served concurrently with his five-year sentence on Count I. In these circumstances, it is well settled that ultimate affirmance of the conviction on Count I would require that the judgment of the court below be affirmed. *E.g.*, *Hirabayashi* v. *United States*, 320 U.S. 81, 85, 105; *Pinkerton* v. *United States*, 328 U.S. 640, 641–642.

In any event, the trial court's instruction as to affiliation was both clear and correct. In *Jencks* v. *United States*, *supra*, the trial court merely quoted dictionary definitions employing synonyms and then

[17] The contention of the *amici* that the trial court "should make reference to a particular clause of Section 5 only if there is corresponding evidence of sufficient weight to support the inference of membership" (*Amici* Br. 25) has no relevance to this case. For here the trial court in fact omitted clauses (1), (9), and (10) of Section 5 apparently (as is, in fact, the case) because there was no evidence to support these criteria. On the other hand, there was clearly sufficient evidence for the consideration of the jury as to all the criteria on which the court did give instructions.

stated, "[a]ffiliation * * * means something less than membership but more than sympathy. Affiliation with the Communist Party may be proved by either circumstantial or direct evidence, or both" (see 353 U.S. at 679). Mr. Justice Burton, in his concurring opinion, did not find that the instruction given was wrong insofar as it went, but that it omitted a crucial element—it "allowed the jury to convict petitioner on the basis of acts of intermittent cooperation. It did not require a continuing course of conduct 'on a fairly permanent basis' 'that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith' " (*id.* at 679–680). The trial court here gave not only the charge given in *Jencks* but also that prescribed by Mr. Justice Burton (Tr. 679, *infra*, p. 61):

> The verb "affiliated", as used in the Second Count of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.
>
> A person may be found to be "affiliated" with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis.

Definitions of affiliation closely similar to that given by Mr. Justice Burton in *Jencks* and the trial court below have also been approved by several courts of

appeals in cases arising under Section 9(h). In *Fisher* v. *United States*, 231 F. 2d at 108, the Ninth Circuit held that "[t]he proper test to apply is whether one could be convicted under the instruction which was given who was only in sympathy with the aims of the Communist Party, and who occasionally would, say, distribute literature for it but without any obligation to do so or to continue to do so." In *Bryson* v. *United States*, 238 F. 2d 657, 664, the Ninth Circuit upheld instructions which are verbatim the same as those given in this case as "full and complete. They adequately informed the jury of the meaning of the term and provided an adequate standard for evaluating the evidence." The Sixth Circuit approved the definition of affiliation in Mr. Justice Burton's opinion in *Jencks*, in *Lohman* v. *United States*, *supra*, 251 F. 2d at 954. And an almost identical instruction to that given in this case was approved by the Tenth Circuit in *Travis* v. *United States*, *supra*, 247 F. 2d at 135, 269 F. 2d at 942.

The definition of affiliation stated by the trial court was also consistent with that provided by this Court in *Bridges* v. *Wixon*, 326 U.S. 135, and by the Second Circuit in *United States ex rel. Kettunen* v. *Reimer*, 79 F. 2d 315, both of which involved the issue whether an alien was deportable because he had been affiliated with the Communist Party. In the *Reimer* case, the court of appeals stated that affiliation was not proved (*id.* at 317):

> * * * unless the alien is shown to have so conducted himself that he has brought about a status of mutual recognition that he may be relied on to co-operate with the Communist

> Party on a fairly permanent basis. He must be more than merely in sympathy with its aims or even willing to aid it in a casual intermittent way. Affiliation includes an element of dependability upon which the organization can rely which, though not equivalent to membership duty, does rest upon a course of conduct that could not be abruptly ended without giving at least reasonable cause for the charge of a breach of good faith.

This definition was quoted and approved by Mr. Justice Douglas, speaking for the majority in the *Bridges* case. 326 U.S. at 142. And he went on to state that affiliation imports "less than membership but more than sympathy." *Id.* at 413.

Petitioner, however, contends (Pet. Br. 22–32) that the trial court's instruction to the jury on affiliation was erroneous because (1) it defined "affiliated with" the Communist Party to mean a direct relationship with the Party rather than membership in an organization affiliated with the Party (Pet. Br. 22–24); (2) the definition of affiliation laid down by this Court in *Bridges* v. *Wixon*, 326 U.S. 135, does not apply under Section 9(h) (Pet. Br. 24–30); (3) if the definition in *Bridges* v. *Wixon* does apply, the trial court's instructions were not consistent with it (Pet. Br. 30–31); and (4) the instructions were internally inconsistent (Pet. Br. 32).

1. Section 9(h) requires union officers to swear that they are not "affiliated with such party," *i.e.*, the Communist Party. Thus, the literal wording of the statute strongly indicates that the oath is violated if the officer is affiliated with the Party *either* because he is

a member of an organization which is affiliated with the Party or he himself is directly affiliated with the Party. Admittedly, in *American Communications Assn.* v. *Douds, supra*, the various opinions state that Section 9(h) applies to members of the Party and affiliated organizations (339 U.S. at 406, 421, 450) without indicating that it also applies to persons affiliated directly with the Party. But these statements were merely general descriptions of Section 9(h); they do not say whether the section also applies to persons affiliated with the Party itself since this issue was not before the Court. Moreover, Mr. Justice Burton in the *Jencks* case, as well as every court of appeals which has considered instructions concerning affiliation, construed Section 9(h) to apply to persons affiliated directly with the Communist Party. See the cases cited *supra*, pp. 50-51, for their approval of instructions similar to those given in this case.

2. It is, of course, correct that the meaning of "affiliation" in Section 9(h) does not necessarily have the same meaning as under the deportation laws and that therefore *Bridges* v. *Wixon, supra*, does not automatically apply to this case. On the other hand, in the absence of some indication in the language, the purpose of the statute, or its legislative history to the contrary, it is probable that the same words in the two statutes have the same meaning—particularly since they are used in the same context, *i.e.*, affiliation with the Communist Party. This is particularly true since Section 9(h) was enacted only two years after *Bridges* v. *Wixon* was decided by this Court.

Every court which has considered this issue has held that the definitions of "affiliation" in the *Bridges* and *Reimer* cases are applicable under Section 9(h). Mr. Justice Burton quoted with approval from *Reimer* and cited *Bridges* in his concurring opinion in *Jencks*, 353 U.S. at 679–680. These same two cases were quoted and cited with approval in *Fisher* v. *United States*, 231 F. 2d at 107–108. And the *Bridges* case was relied upon in *Lohman* v. *United States*, *supra*, 251 F. 2d at 954, and *Bryson* v. *United States*, 238 F. 2d at 664.

Petitioner claims (Pet. Br. 25–30) that, if the definition in *Bridges* v. *Wixon* is applied under Section 9(h), the result is to raise constitutional problems. First, petitioner says, the definition in *Bridges* may violate due process since it "is defined only in terms of the mental attitude of the individual involved, with no objective criteria of guilt * * *" (Pet. Br. 25). Just as with regard to membership, however (see *supra*, pp. 39–41), affiliation necessarily involves the subjective relationship of the organization and the person who is allegedly affiliated with it. But this subjective relationship can be determined by the jury only on the basis of objective evidence. Thus, the trial court expressly told the jury that "[w]hether or not the defendant was affiliated with the Communist party * * * is a question of fact which you are to determine from all the evidence in the case" and this determination should be based on the "statements made or acts done by the accused, and all other facts and circumstances in evidence * * *" (Tr. 679–680, *infra*, pp. 61–62).

Second, petitioner argues that the definition of "affiliation" in *Bridges* may, if applied under Section 9(h), violate the First Amendment (Pet. Br. 37). He reasons that in *American Communications Assn.* v. *Douds*, *supra*, this Court upheld the affiliation provision in Section 9(h) only because of the likelihood that members of the Communist Party would engage in political strikes; and that a person could be affiliated with the Communist Party by merely allying with the Party in order to achieve a socialist state without adopting its discipline or methods. However, the definition of affiliation in *Bridges* (as well as in the instructions in this case) requires proof that the Party can rely on its affiliate on a reasonably permanent basis. Congress could well conclude that a person who can be relied on by the Communist Party on a reasonably permanent basis will probably use the political strike, one of the Party's major weapons, and cooperate with the Party in such strikes. Certainly, the connection between a person upon whom the Party can directly rely and the political strike is, at the least, as close as the connection between a person who is a member of an organization which is affiliated with the Communist Party and the political strike. And this Court in *American Communications Assn.* v. *Douds*, expressly upheld the constitutionality of the affiliation provision of Section 9(h) insofar as it applies to members of organizations affiliated with the Party.

3. As we have shown above, the instruction given by the trial court as to affiliation is extremely close to that prescribed in *Bridges* v. *Wixon*. But peti-

tioner emphasizes (Pet. Br. 30) that in *Bridges* (326 U.S. at 143–144) this Court went on to say that "the act or acts tending to prove 'affiliation' must be of that quality which indicates an adherence to or a furtherance of the purposes or objectives of the proscribed organization as distinguished from mere cooperation with it in lawful activities." This part of the definition of affiliation in *Bridges* v. *Wixon*, however, clearly does not apply to cases under Section 9(h). Thus, Mr. Justice Burton did not require an instruction as to the illegal objective of the alliance between the affiliate and the Communist Party in his definition of affiliation in *Jencks*.

Bridges v. *Wixon* involved a provision which made aliens deportable who are "affiliated with any organization * * * that believes in, advises, advocates, or teaches: (1) the overthrow by force or violence of the Government of the United States * * *." 326 U.S. at 138, note 1. Thus, the statute was expressly operative only in the event of proof of affiliation with an organization advocating illegal objectives, *i.e.*, forcible overthrow of the government. On the other hand, as this Court found in *American Communications Assn.* v. *Douds*, *supra*, 339 U.S. at 387–389, the purpose of Section 9(h) was to prevent persons, whether members of or affiliated with the Communist Party, from becoming leaders of labor unions and using their position to interrupt interstate commerce by calling political strikes. Since political strikes interfere with interstate commerce whether their ultimate objective is lawful or not (and whether or not violence is a part of such a strike), Congress intended

to deprive unions of the use of facilities of the National Labor Relations Board whenever they were led by Party members or affiliates. It makes no difference that the intent of the union leaders was to further only lawful objectives of the Party (see *American Communications Assn.* v. *Douds, supra,* 339 U.S. at 393)—particularly since the Party, in calling on the union leader who was its permanent ally, might well be using the strike for illegal purposes even though the leaders' own intent was lawful. In short, Congress wanted to sterilize the Party's influence in the labor field, and it was irrelevant to that purpose whether the affiliated union leader agreed with or accepted the Party's illegal objectives. All that is involved under Section 9(h) is the close and intimate connection with the Party which "affiliation" connotes.

4. In the first paragraph of its instruction on affiliation, the trial court stated that affiliation "means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party" (Tr. 679, *infra,* p. 61). Two paragraphs later, the trial court charged that "affiliation * * * means a relationship which is equivalent or equal to that of membership in all but name" (Tr. 679, *infra,* p. 61). While these two instructions appear to be conflicting, they were more favorable to petitioner, taken together, than any instructions to which he was entitled. The instruction in the first paragraph, as we have shown above (pp. 50-53), correctly stated the law. The instruction in the third paragraph incor-

rectly put a heavier burden of proof on the government. If the jury was confused by the contradictory instructions, they presumably resolved the conflict by finding that petitioner was affiliated with the Communist Party under either definition. At the least, the jury could not have required a lesser standard of proof than that set forth in the first paragraph.

The basic weakness in petitioner's contention as to the instructions given by the trial court is that he seeks to require instructions as specific as mathematical formulas. Such self-defining clarity is neither required nor possible. Even if we assume that instructions on some other issue can achieve such high precision, "membership" and "affiliation" are relationships between two parties which by their very nature cannot be defined in absolute terms. All that can be expected is that the trial court set forth criteria which give the jury a reasonable statement of the ultimate issue—*i.e.*, whether petitioner was a member of or affiliated with the Communist Party on the date he executed his affidavit—and the various considerations which can properly be considered in reaching this determination. We submit that the instructions in this case, which are fully consistent with and were indeed based on all the judicial precedents under Section 9(h), more than adequately meet this test.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be vacated and the case remanded to the district court for consideration whether the failure of the government to produce the reports and receipts of witnesses' expenses constituted error requiring a new trial. We also suggest that the Court pass at this time on the issue relating to the instructions to the jury, and submit that the Court should hold that the instructions, as given, were not erroneous.

Respectfully submitted,

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SEPTEMBER 1961.

APPENDIX

Instructions

Proposed Instruction No. 20 was tendered by the government and given by the court as follows (Tr. 679–680):

> The verb "affiliated", as used in the Second Count of the indictment, means a relationship short of and less than membership in the Communist Party, but more than that of mere sympathy for the aims and objectives of the Communist Party.
>
> A person may be found to be "affiliated" with an organization, even though not a member, when there is shown to be a close working alliance or association between him and the organization, together with a mutual understanding or recognition that the organization can rely and depend upon him to cooperate with it, and to work for its benefit, for an indefinite future period upon a fairly permanent basis.
>
> Briefly stated, affiliation as charged in the Second Count of the indictment, means a relationship which is equivalent or equal to that of membership in all but name.
>
> Whether or not the defendant was affiliated with the Communist Party at the time alleged in the indictment is a question of fact which you are to determine from all the evidence in the case. Affiliation or lack of affiliation in the Communist Party may be established by direct as well as circumstantial evidence.
>
> In determining the issue as to whether the defendant was or was not affiliated with the Communist Party at the time alleged in the indictment, you may take into consideration

any statements made or acts done by the accused, and all other facts and circumstances in evidence which may aid determination of the issue.

Proposed Instruction No. 12 was tendered by the fendant and given by the court as follows (Tr. 701):

> Unless in addition to being convinced beyond a reasonable doubt that the defendant was a member of the communist party on December 11, 1952, you are also convinced beyond a reasonable doubt that he knew he was a member of the communist party on December 11, 1952 and signed and filed the affidavit and caused the affidavit to be filed on December 11, 1952, knowing that he was a member on December 11, 1952, you must find him not guilty under Count I of the indictment.

Proposed Instruction No. 13 was tendered by the defendant and given by the court as follows (Tr. 702):

> Unless in addition to being convinced beyond a reasonable doubt that the defendant was affiliated with the communist party on December 11, 1952, you are also convinced beyond a reasonable doubt that he knew he was affiliated with the communist party on December 11, 1952, and signed and filed the affidavit and caused the affidavit to be filed on December 11, 1952 knowing that he was affiliated with the communist party on December 11, 1952, you must find him not guilty under Count II of the indictment.

Proposed Instruction No. 19 was tendered by the government and given by the court as follows (Tr. 703–707):

> The crucial issue of fact in this case is whether on December 11, 1952, John Joseph Killian was or was not then a member of the Communist Party or affiliated with such Party.

The affidavit does not call upon any person to state whether or not in the past he has ever been a member of the Communist Party or affiliated with it. A person who has been at some time in the past a member of the Communist Party or affiliated with that Party but who has terminated such membership or affiliation prior to the making of the affidavit would be entitled to sign the affidavit under oath without violating the law.

Since the affidavit speaks in the present tense only, the fundamental issue of fact for you to decide is whether or not at the time alleged in the indictment the defendant knowingly and willfully used an affidavit which was false and which he knew to be false at that time.

Whether or not the defendant was a member of the Communist Party at the time alleged in the indictment is a question of fact which you are to determine from all of the evidence in the case. In determining this question you must bear in mind that the burden of proof rests on the Government to prove the defendant guilty beyond a reasonable doubt. Membership or lack of membership in the Communist Party may be established by direct as well as circumstantial evidence.

Membership in the Communist Party, the same as membership in any other organization, constitutes the state of being one of those persons who belong to or comprise the Communist Party. It connotes a status of mutuality between the individual and the organization. That is to say, there must be present the desire on the part of the individual to belong to the Communist Party and a recognition by that Party that it considers him as a member.

Intent is a state of mind and can only be determined by what an individual says and what he does. In determining the issue as to whether the defendant was or was not a member of the Communist Party at the time alleged in the indictment you may take into considera-

tion the acts and statements of this defendant, as disclosed by the evidence, bearing in mind that individual and unrelated isolated acts of the defendant showing cooperation with the Communist Party or isolated statements of the defendant showing sympathy with the Communist Party are not in themselves conclusive evidence of membership but are circumstances which you may take into consideration along with all the other evidence in this case.

In determining whether or not the defendant was a member of the Communist Party at the time alleged in the indictment you may take into consideration whether the defendant:

1. Paid dues or made any financial contributions to the Communist Party or collected any funds on its behalf;

2. Attended Communist Party meetings, classes, conferences, or any other type of Communist Party gathering;

3. Had made himself subject to the discipline of the Communist Party in any form whatsoever;

4. Participated in any recruiting activities on behalf of the Communist Party;

5. Has executed orders, plans or directives of any kind of the Communist Party;

6. Has acted as an agent, messenger, correspondent, organizer, or in any other capacity in behalf of the Communist Party;

7. Has been accepted to his knowledge as an officer or member of the Communist Party, or as one to be called upon for services by other officers or members of the Communist Party;

8. Has conferred with officers or other members of the Communist Party in behalf of any plan or enterprise of the Communist Party;

9. Has spoken or in any other way communicated orders, directives or plans of the Communist Party;

10. Has advised, counseled, or in any other way imparted information, suggestions, or rec-

ommendations, to officers or members of the Communist Party or to anyone else, in behalf of the Communist Party;

11. Has indicated by word, action, conduct, writing, or in any other way, a willingness to carry out in any manner and to any degree the plans, objectives or designs of the Communist Party;

12. Has in any other way participated in the activities, planning or actions of the Communist Party;

These are some of the indicia of Communist Party membership but you are not limited solely to those I have enumerated. As sole arbiters of the facts, it is your duty to consider all the evidence, either direct or circumstantial, which bears upon the question of whether or not the defendant was a member of the Communist Party on the date alleged in the indictment.

In determining this question, you must bear in mind that the burden of proof rests upon the Government to prove the defendant guilty beyond a reasonable doubt. If you find that the Government has sustained this burden by proving beyond a reasonable doubt that the defendant was a member of the Communist Party on December 11, 1952, as alleged in the indictment, and if you find, also, that the Government has proved beyond a reasonable doubt the other essential elements of the offense charged in the first count of the indictment, as I have outlined them to you, then you must find the defendant guilty as to the first count.

Proposed Instruction No. 22 was tendered by the government and given by the court as follows (Tr. 708):

Even if you are convinced beyond a reasonable doubt from the evidence that the defendant attended so-called "closed meetings" of the

communist party or of members of the communist party, such evidence standing alone does not prove that the defendant was a member of the communist party.

However, you are free to consider evidence of this fact along with all other evidence in this case in determining whether or not the defendant was a member of the communist party.

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IN THE

Supreme Court of the United States

October Term, 1961

No. 7

JOHN JOSEPH KILLIAN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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UNITED STATES OF AMERICA.

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PETITIONER'S REPLY BRIEF

I. The issues raised by the government's destruction of and refusal to produce documents.

Less than two weeks before oral argument the Solicitor General informs this Court and opposing counsel that the Department of Justice caused both the trial court and the Court of Appeals to rule on the producibility of the statements of Ondrejka and Sullivan believing that all these statements existed and contained only a schedule of dates and amounts of the payment they had received as informers.[1]

[1] At the trial the government counsel represented that the statements in question existed as "administrative parts of the bookkeeping and files and records of the Administrative Office of the Federal Bureau of Investigation which Administrative records are as important to the Federal Bureau of Investigation in the setting up of many of its matters, including the matters of its budget and expenses and costs of operation, as are any of the other of its administrative documents and files" (tr. 550-551). He further indicated to the trial court that these statements did not itemize the "expenses" of the witness (tr. 551).

[Continued on page 2]

In point of fact, we are now told, Ondrejka's statements were made orally to F.B.I. agents who made "hand written notes of the amounts spent by Ondrejka for expenses which they transcribed to the receipts later signed by Ondrejka when he received reimbursement. The *personal* notes were destroyed immediately in the normal course of operation" (Government Brief, p. 24, emphasis supplied). The reports compiled on the basis of these notes and signed by the witnesses are in existence, and contain information in addition to the dates and amounts of payment.

We are less than impressed by the present candor of the Department of Justice. We note for instance that the Department does not tell us if Sullivan's reports were made and receipts signed in the same way as were Ondrejka's, and, if so, whether by some happy chance his agents' "personal" notes were not destroyed and are available. We are not told if the "normal" course of operation in which the notes were destroyed was one prescribed by the Department of Justice by rule or established practice, or was left as a matter of policy to the agent's discretion (or his superior's). We are not sure whether the notes of the oral reports were identical with the signed receipts or how they differed. We are not even told when the true facts became known. By the very nature of the relevant information it is solely within the Department's possession. We submit that the Department of Justice, for whatever reason, has not sustained the burden of complete candor which the facts here throw upon it.

[Continued from page 1]

In its brief before the Court of Appeals, the Department of Justice clearly inferred that these statements existed, complaining that to require production of the statements would be "difficult, time consuming, and wholly unnecessary" (Government Brief, p. 41), and that there would be no way to excise irrelevant matter (Government Supplemental Brief, p. 6). The Department of Justice also represented that "The actual receipts do not contain a schedule of the purposes for which the reimbursement was made but merely the total which was paid" (Government Brief, p. 21 fn. 14).

The Department of Justice's frankness would be more impressive if it did not proceed to argue therefrom that petitioner should be left remediless, even though he has been deprived by the Department's own action of rights which this Court and Congress has deemed appropriate to a fair trial. As we show in the succeeding pages the Department of Justice is mistaken; these rights are not meaningless; the law does provide meaningful remedies to secure the protection of a defendant's rights.

A. The destruction of the agents' notes irretrievably deprives defendant of due process of law and his rights under Title 18 U. S. C. Section 3500. The proceeding should be dismissed.

It is fundamental to the concept of fairness in any society that a police agency, preparing a case for prosecution has no right to suppress or destroy evidence. *Mooney* v. *Holohan*, 294 U. S. 103, *Napue* v. *Illinois*, 360 U. S. 264, *Pyle* v. *Kansas*, 317 U. S. 213. The sinister potentials in such a practice are plain, *e.g.*, *United States ex rel. Thompson* v. *Dye* (3 Cir. 1955), 221 F. 2d 763, *cert. denied*, 350 U. S. 875; *United States ex rel. Montgomery* v. *Ragen* (N. D. Ill., 1949), 86 F. Supp. 382. Even when malice cannot be shown, the fact is that a police agency is least able to determine which evidence will be deemed useful for the defense and which will not. A prosecutor may not decide for the Court what is admissible, or for the defense what is useful. *Griffin* v. *United States* (D. C. Cir., 1950), 183 F. 2d 990, 992-3. The right to counsel means that decision as to the use the defense wishes to make of evidence is the prerogative of the defense, *Jencks* v. *United States*, 353 U. S. 657, 668-669. The usurpation of that right by the police is a denial of a fair trial.

The Department of Justice cannot argue that the agents' notes which it destroyed were not producible at trial for use by the defense. The notes would have been producible under subpoena. (In the argument of *Palermo*

v. *United States*, 360 U. S. 343, the government conceded that a defendant might examine the agent who had interviewed a witness, 360 U. S. at p. 362, fn. 1. The agents' notes, made in the regular course of business, would likewise be producible.) The government concedes (Government Brief, p. 23), that the agents' notes could also have come within the production requirements of Section 3500.

The government tells us that the agents' notes were destroyed "in the normal course of operation". We cannot ascertain from this ambiguous phrase whether the suppression of evidence was pursuant to a directive of the Department, or to a customary Departmental procedure. What the Solicitor General does disclose by this phrase is that the destruction was voluntary and the result of a common practice whereby the Department of Justice customarily destroys potential evidence while a criminal investigation is pending. Even when the suppression of evidence is negligent a conviction cannot be upheld. *United States* v. *Consolidated Laundries Corporation* (2 Cir., 1961), 291 F. 2d 563, *United States* v. *Heath* (D. Hawaii, 1957), 147 F. Supp. 877, *appeal dismissed* (9 Cir., 1958), 260 F. 2d 623. It does not matter therefore that the suppression of evidence here may not have been maliciously aimed at the individual defendant personally but, with majestic and indifferent impartiality, was execution of a policy which destroyed the rights of the whole class of defendants in federal criminal proceedings. The result is the same; the governing principle is the same. A police agency has no right to suppress potential evidence and deprive a defendant of its use, whether the suppression be done vengefully or indifferently.

The Department of Justice may argue, either directly or inferentially, that because the agents' notes were destroyed many years ago, prejudice to the petitioner cannot now be shown. Such an argument is unworthy. To hold that because the suppression has been complete, rather

than partial, it should be permitted to be successful, it is to make an absurdity of a defendants' rights and open the door to their destruction by artifice. The right is not illusory, it is fundamental and cannot be destroyed by sophistry or technicality. Moreover, a defendant's right to the production of statements under Section 3500 (or under preexisting law as declared by the *Jencks* decision[2]) does not depend upon a showing by him of their degree of materiality. Once the documents are shown to relate to the witness' direct testimony they are producible. When the agents' notes were destroyed the Department of Justice made it impossible for petitioner to secure his rights.

It should be noted that we are not dealing here with peripheral aspects of the problem. We are not concerned with the problem of some file clerk's lack of accuracy and care. Nor do we require that the government amass papers into eternity. We do maintain that while a criminal investigation is under way a police agency may not suppress or destroy potential evidence, at least until the investigation is completed.

The government described the agents' notes which were destroyed as "personal". We do not understand this usage. The notes were not "personal" in any meaningful sense. They did not deal with the personal affairs of the agents nor were they made in the course of some unofficial private investigation. They were made by a government agent, relating to government business, in the course of an official government investigation. Their making was a governmental act. Their destruction in the ordinary course of operation was also a governmental act which deprived defendant of his rights.

After two trials and two appeals, the Department of Justice now suggests that a hearing be held in the District

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[2] At petitioner's first trial, prior to the *Jencks* decision, petitioner had demanded production of the statements of the witnesess.

Court to determine whether or not the agents' notes were actually destroyed (Government Brief, p. 24). We see no point in such a hearing. If the agents involved have informed the Solicitor General that the notes were destroyed, we do not expect them to testify otherwise at a hearing. The sole result of such a hearing would be to establish a further factual basis for dismissal. Accordingly we accept the Solicitor General's representation that the notes were destroyed. Such destruction made it impossible for petitioner to secure his rights at trial. The only remedy is the dismissal of the proceeding.[3]

B. The failure of the trial court to require the production of the statements in the nature of receipts signed by the witnesses requires that a new trial be ordered.

After resisting production of the witnesses' statements in the District Court, the Court of Appeals, and on petition for certiorari here, the Department of Justice now requests that the question of the production of the receipts be returned to the District Court for determination, after an *in camera* inspection, whether a new trial should be ordered, this determination to be again subject to review by the Court of Appeals, and possible review by this Court. If for no other reason, practical considerations of the administration of justice make this cumbersome procedure improper. In the first place, conceded error in the jury instructions requires that a new trial be had in any event. Even were that not the case little time would be saved even in the District Court. The trial of this case took only six court days. The *in camera* determination by the District Court would involve, as the government points out

[3] If we did not deem the admission of the destruction of Ondrejka's statements to be sufficient for dismissal we shoud ask that the Department be required to state whether the record of Sullivan's oral statments were also destroyed. A close reading of the record (tr. 373-375) in the light of the Solicitor General's admission regarding Ondrejka's statements would indicate that Sullivan's oral reports were likewise recorded by the agents in their "personal" notes.

(Government Brief, p. 27), a reading and detailed analysis of a cold record of some 700 pages, and careful, analytical comparison of the presently unproduced statements (which are 124 in number) with that record and with the narrative statements of the two witnesses which the government did produce. If any scant amount of time would be saved over a new trial, it would not in any event compensate for the loss of the heightened possibilities for judgment and insight which the trial process affords.

Moreover the Department of Justice presents no valid reason why the trial judge might refuse to order a new trial. The petitioner made proper demand for the statements. The documents "relate to" the testimony of the witnesses. Their exclusion was not "harmless error." The statute grants to a defendant an unqualified right to production of this kind of document at his trial. The Department of Justice refused to accord the petitioner here that right and was erroneously upheld by the trial court and the Court of Appeals. (It did not even produce the documents for preliminary inspection by the trial judge so that a record might be made.) The only possible remedy for the Department's dereliction is a new trial.

1. *Proper demand was made for the documents in question.*

It ill becomes the Department of Justice which refused to produce the documents and distorted their contents, to claim that petitioner did not make proper demand for them. Petitioner moved, as the statute requires, for the statements of the witnesses at the end of their direct testimony (tr. 330, 455); the trial court ordered they be produced; the government agreed to produce them. The statute then placed the obligation upon the government to produce *all* the witnesses' statements (including the ones which it refused to produce). The government cannot now pass on to defense counsel the duty to call further attention to its own deliberate act of non-feasance or to argue to the trial court how he would use documents he had never seen.

The Department's position here is particularly ill taken since it was aware in advance that these documents were desired and had determined to deny them. After the conclusion of Sullivan's direct testimony when a general demand was made for production the Assistant United States Attorney said:

> "I think I know what he wants. He wants to proceed to lay a foundation for asking for the financial reports, I mean, how much Sullivan received" (tr. 334).

The government brief admits (p. 32) that had petitioner specifically requested the production of the Sullivan documents it had already prepared a schedule which it would offer as a substitute.[4]

The government argument, that because a defendant refused to surrender his rights under the statute and accept a substitute document (which he could not be assured contained the same information as the witnesses' statements (tr. 551)) he should lose all rights under the statute, is untenable.

2. *The documents "relate to" the direct testimony of the witnesses within the meaning of 18 U. S. C. Section 3500(b). The refusal to order their production was error.*

The term "relates to" as it appears in Section 3500(b) derives directly from this Court's opinion in *Jencks* and is intended to include a far broader area than the limited area of admissible evidence. In *Jencks* this Court pointed out that the criteria sufficient for production were much broader than the requirements for admissibility. The Court said (353 U. S. at p. 669):

> "Relevancy and materiality for the purposes of production and inspection, with a view to use on

[4] We still do not understand why if as the government says, the substitute schedule contained all the information in the documents, the government did not produce the documents themselves.

> cross-examination, are established when the reports are shown to *relate to* the testimony of the witness." (emphasis supplied)

The adoption of this phrase by the legislature demonstrates a legislative intent to adopt the judicial construction of that phrase.[5]

Plainly, the withheld statements "relate to" the testimony of the witness. The government itself concedes (Government Brief, p. 33-34) that on the basis of those statements the defense might have been able to develop that petitioner's participation in Party activities was of so limited a nature as to indicate non membership. Having conceded that the withheld documents would be of use to the defense, the Department argues—as would every prosecutor—that this would be unavailing. This argument has already been answered by this Court in *Jencks*, 353 U. S. at pp. 669-669:

> "Because only the defense is adequately equipped to determine the effective use for purposes of discrediting the government witness and thereby furthering the accused's defense, the defense must be initially entitled to see them to determine what use may be made of them. Justice requires no less."

The Department of Justice is least equipped to estimate to what degree and with what effectiveness the defense might have used these documents. Only a new trial can test that.

The withheld statements also relate to the testimony of the witness in that they cast light upon his credibility by revealing him to be a paid informer for hire and the extent of his pecuniary commitment.[6] Two thousand years

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[5] The phrase is also used in Rule 26(b) of the Federal Rules of Civil Procedure. The scope of inquiry permitted by that rule is not limited by rules of admissibility at trial, but is far broader.

[6] There is also the possibility that the witnesses might be shown to have filched money from the government.

of history have established that witnesses who make a business of informing are unreliable, 3 Wigmore Section 969; Bowers, *Jefferson and the Bill of Rights*, 41 Virginia Law Review 709, 721; Donnelly: *Judicial Control of Informants*, 60 Yale Law Journal 1091, *Communist Party* v. *Subversive Activities Control Board*, 351 U. S. 115; *Mesarosh* v. *United States*, 352 U. S. 1; *Jencks* v. *United States*, 353 U. S. 657; *Fisher* v. *United States*, (9 Cir., 1956), 231 Fed. 99; *Fletcher* v. *United States*, (D. C. Cir., 1946), 158 F. 2d 321; *Cratty* v. *United States*, (D. C. Cir., 1947), 163 F. 2d 844.

It is too late to argue here that matter which goes to the witness's credibility and does not directly contradict his testimony does not "relate to" his direct testimony. In *Rosenberg* v. *United States*, 360 U. S. 367, every member of the Court agreed that a statement was producible under Section 3500 although it did not contradict the direct testimony but merely impeached the credibility of a witness. The government argues that because Sullivan did not testify on direct examination that he was a paid informer, the withheld data did not relate to the direct testimony. When the Department of Justice placed Sullivan on the witness stand it placed his credibility in issue.[7] *Napue* v. *Illinois*, 360 U. S. 264, 269.

3. *The failure to order the production of the withheld statements was not "harmless error."*

Although the government uses the phrase "harmless error" to describe the rulings of the trial court it is not using the phrase in the customary fashion. The burden of the government's argument is not that the error which occurred was in fact harmless, but that the error hypothetically would have been or might have been harmless.

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[7] As we have argued in our principal brief (p. 10) the statute does not give the Department of Justice or the trial judge any discretion. Once producibility under the statute is shown, the documents must be produced. *A fortiori*, there is no discretion here where the documents plainly relate to the direct testimony.

The government argument is that the trial judge would not have (or might not have) permitted the use of the withheld material for cross-examination, ruling it cumulative. But the cross-examination might have been differently conducted had defendant's counsel been furnished with the documents. The trial judge might not have shortened such an examination.[8]

The Government's speculative conjectures do not meet the requirements of "harmless error" *Gordon* v. *United States,* 344 U. S. 414, 420.

The government also advances the argument that the failure to produce the statements was harmless error because, *if* petitioner had accepted the proffered schedule instead of the documents to which he was entitled, the trial court *could have* ruled that the documents were cumulative. Here again, the hypothetical possibilities posed by the government do not reach the level of "harmless error."

The trial judge could not say with any certainty that his error was a harmless one. As the Court of Appeals for the Second Circuit pointed out in *United States* v. *Zborowski* (2 Cir., 1961) 271 F. 2d 661, 667.

> "No one can ever say in a particular case just what bit of evidence may turn the tide one way or the other. In every case where a jury has rendered a conviction and where other impeaching evidence is available, it could be argued that the grand jury evidence was merely cumulative. But of course the point in allowing full and free cross-examination is to permit this very cumulation of evidence. So long as evidence of this nature is relevant it ought to be freely available to a defendant for whatever use he may wish to make of it."

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[8] We read the trial court's ruling (tr. 506-509) foreclosing examination on Sullivan's reports, as acceptance of the government's position at trial, that the defense could not inquire into the existence of producible statements other than those the government had already furnished.

In any event, under no view of the law could petitioner have been compelled to accept the schedule in exchange for his rights to the documents themselves since the schedule did not include all the information contained in the documents. The government cannot make petitioner's valid refusal to surrender his rights into an excuse for the destruction of those rights.

At the heart of the government's "harmless error" argument is a confusion between the requirements for production and the considerations governing admissibility. The government is attempting to limit producible documents to those which are clearly admissible. Because a document may not be admissible does not mean that a defendant is not entitled to its production. The contrary is the case. Nothing in the statute indicates an intent to change the ruling of this Court in *Jencks* and *Gordon* v. *United States*, 344, U. S. 414, that the material to be produced need not be absolutely admissible. The use of the broad term "relates to" indicates a congressional intent to preserve the effect of these rulings[7]

The distinction between productibility and admissibility is an important one. A document may not be admissible and yet lead discovery of acts or new approaches to trial which may change the result of the case. Had defense counsel been properly furnished with these documents they might well have served a discovery function and led the petitioner's counsel to open further the defense which even the government concedes to be a possible one (Government Brief, pp. 34-35), that petitioner's absence from Party affairs indicated non-membership in the Party.

The argument of the government, opens the door to an evisceration of the statute. Prosecuting attorneys naturally tend to resist demands for production as oppressive, and to believe that the material sought cannot possibly help their opponent, or is inadmissible. Given the facts of human nature, if the government's argument is accepted here, the tendency of prosecutors to withhold producible documents (an act which is all the more pernicious because it is liable to go undetected) will be increased.

II. The erroneous instructions on membership and affiliation.

A. The confusion of the statuses of membership and affiliation.

The government squarely concedes (Government Brief, pp. 58-59) that the instruction that "affiliation • • • is equivalent or equal to membership in all but name" was error. This conceded error by the trial court must in and of itself vitiate the instructions on membership and affiliation and requires reversal. When the jury was erroneously instructed that affiliation was equivalent to membership, then by a necessary and immediate implication it was also erroneously instructed that membership was equivalent to affiliation. As we have shown in our principal brief and as the government now concedes the two statuses are separate and distinct. The instructions invited, if they did not require, the jury to return a finding of guilty on the membership count on the basis of evidence of affiliation (and the converse).

The conceded error permeated the instructions. On an operational level the two concepts of membership and affiliation were completely confused. Both were defined in terms of subjective attitudes only. The proof of both statuses was to be derived from the jurors' evaluation of the degree to which the defendant's political attitudes and acts evidenced sympathy with Communism (an evaluation which the jurors had perforce to make in terms of their own political attitudes). Even had the trial judge not made overt his erroneous equivalence of membership and affiliation, no jury, on the basis of his instructions (which were suggested by the Department of Justice) could have discriminated between the two statuses of membership and affiliation.

B. The trial court's subjective definitions of membership and affiliation destroy the constitutional rationale of the statute.

In *American Communications Association* v. *Douds*, 339 U. S. 382, this Court upheld the constitutionality of the forepart of the oath because, the Court held, it dealt with objective definable facts, formal subjection to the organizational discipline of the Communist Party or an affiliate, from which Congress might conclude a likelihood of engagement in political strikes. Only four members of this Court in *Douds* affirmed the constitutionality of an oath directed to a state of mind, even when that state of mind was belief in the overthrow of the government. Here, the state of mind involves no such closeness to engagement in political strikes. The translation which the government now proposes of the objective criteria of the oath as to membership and affiliation into subjective ones, therefore destroys the constitutional foundation which, this Court held, supported the oath.

The state of mind which the government would have the oath encompass is too remote from the danger foreseen by Congress to permit of a constitutional invasion. The oath then would neither relate to facts which, this Court has held, would sufficiently indicate a dangerous propensity nor to a state of mind which, this Court has held, to be an immediate premise to the forfended act, engagement in political strikes. By relying on the doctrine of guilt by association (association both with men and ideas), it would penalize free experimentation and inquiry in the area of political thought long before the threshold of any threat to an area with which the state has a right to concern itself.

Our legal tradition has long recognized that subjective attitudes are not reachable by the state until they approach the threshold of action, *e.g.*, the principle of *locus poenitentiae*. Ordinarily the law does not reach a state of mind

unaccompanied by objective facts. The law recognizes that between attitudes and action there is a vast gulf where ideas are tempered and preconceptions changed. This same premise must require any vital society to tolerate subjective attitudes and ideas (even though unpopular) which do not reach the threshold of action.[9] Otherwise the potential of benefit, either in the ideas themselves or in their interaction with other ideas, will be destroyed and growth and development limited thereby. As between a static and a dynamic society, the First Amendment chooses that ours shall be a society where mental attitudes are free.

The instructions below, particularly with reference to the "indicia" of membership, illustrate the dangers of any other approach. The illogic of the doctrines of parallelism and of the ascription to ideas of the result toward which the triers of fact feel (whether from preju-

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[9] Lord Macauley has pointed out a fallacy of any other position:

"It is altogether impossible to reason from the opinions which a man professes to his feelings and actions; and in fact no person is ever such a fool as to reason thus except when he wants a pretext for persecuting his neighbors. A Christian is commanded, under the strongest sanctions, to be just in all his dealings. Yet how many of the twenty four millions of professing Christians in these islands would any man in his senses lend a thousand pounds without security? A man who should act for one day, on the supposition that all the people about him were influenced by the religion which they professed, would find himself ruined before night; and no man ever does act on that supposition in any of the ordinary concerns of life, in borrowing, in lending, in buying, or in selling. But when any of our fellow creatures are to be oppressed the case is different. Then we represent these motives which we know to be so feeble for good, as omnipotent for evil. Then we lay to the charge of our victims all the vices and follies to which their doctrines, however remotely, seem to tend. We forget that the same weakness, the same laxity, the same disposition to prefer the present to the future, which make men worse than a good religion made them better than a bad one." *Civil Disabilities of the Jews*: 3 Macauley's Collected Essays 255, 263, *D. Appleton and Company, New and Revised Edition* (1878).

dice or otherwise) that they trend is inherent in any attempt to penalize a subjective attitude. Whether that attempt be characterized as a deprivation of freedom of speech or of due process of law, it is unconstitutional.

CONCLUSION

For the reasons set forth in this brief and our foregoing brief the proceeding should be dismissed. In the alternative, a new trial should be ordered.

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IN THE

Supreme Court of the United States

October Term, 1961

No. 7

JOHN JOSEPH KILLIAN,
Petitioner,

vs.

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE AND PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

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Petitioner, John Joseph Killian, respectfully moves for leave to file the annexed petition for rehearing of the order of this Court denying in part the petition for writ of certiorari, reported at 365 U. S. 810. Rehearing is sought at this time because, as is more fully pointed out in the annexed petition, the decision of this Court in this case on December 11, 1952, adds new importance to the questions presented, particularly in view of the possibility of a retrial.

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IN THE

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vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF DENIAL OF WRIT OF CERTIORARI

Petitioner John Joseph Killian prays that this Court grant rehearing of its order reported at 365 U. S. 810 denying in part the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above entitled cause.

Statement of Events Warranting Rehearing

The opinion of this Court, handed down December 11, 1961 held that the trial court had properly defined membership and affiliation as subjective relationships since they were such "to all but the organization and its member or members." The Court held, since the government had confessed error, that a District Court hearing should be held on the question of whether petitioner's rights had been prejudiced by the failure of the prosecution to produce certain statements. The majority opinion further discussed the proper definition of the term "affiliated with." It is respectfully submitted that the majority opinion and decision of this Court warrant rehearing of the denial of the writ of ceriorari.

Questions Presented

The decision of this Court requires us to rephrase questions "4" and "7," as presented in our Petition for a writ of certiorari, to read as follows:

1. In a prosecution under Title 18, U. S. C. A. § 1001 defendant was charged with "knowingly" and "willfully" filing a Taft-Hartley non-Communist affidavit which was allegedly false in its denials that defendant was a member of the Communist Party or affiliated with that Party. The later decision of this Court held that while these terms define a subjective relationship only, there was a legitimately alternative possible meaning of the term "member" as defining a relationship having both objective and subjective components.

a. Should the trial judge have instructed the jury that it could not convict if it found that defendant, in taking the oath, believed in good faith that he was not a member of or affiliated with the Communist Party?

b. Was it error for the trial judge to instruct the jury that to act "knowingly" merely means "to act voluntarily and purposely and not because a mistake or inadvertence or other innocent reason?"

c. Was it error for the trial judge to instruct the jury that a person is held to intend the natural and probably consequences of acts "knowingly" done?

2. Where the defendant's good-faith understanding of the meaning of membership in and affiliation with the Communist Party is put in issue in a prosecution for filing a false non-Communist affidavit, and prosecution witnesses have testified concerning the structure and nature of the Communist Party, should the production of those witnesses' "statements" under Title 18 U. S. C. A. § 3500 be restricted,

merely because those statements did not specifically mention the defendant, although they might cast light upon the actual meaning of membership and affiliation within the area of defendant's knowledge, and upon defendant's understanding of those concepts?

The opinion of the majority of the justices raises the following question which was not previously presented.

3. Where the indictment charges in separate counts that defendant simultaneously made false statements that he was not a "member" of or "affiliated with" the Communist Party (statuses which are by definition mutually incompatible), should the trial judge upon proper request have instructed the jury that defendant could not be found guilty on both counts?

The remainder of the questions upon which certiorari was previously denied are as follows:

4. Whether the evidence in this case was sufficient to support a judgment of conviction of violation of 18 U. S. C. §1001 by filing a false affidavit of non-Communist Union Officer with the National Labor Relations Board's Regional Office, Chicago, Illinois, when:

a. The record is silent as to any acts of Communist Party membership or affiliation by petitioner for some thirteen months prior to the filing and some three months thereafter?

b. The sole evidence of petitioner's Communist Party membership or affiliation is the testimony of a single uncorroborated witness?

c. The only evidence that petitioner knew that the affidavit was to be submitted to a government agency and that he signed it for the purpose of using the facilities of the National Labor Relations Board, is the mere fact that petitioner signed the affidavit?

d. There is no evidence that the petitioner's union made any use of, or attempted to use the machinery of the National Labor Relations Board while petitioner was an officer of the union?

e. There is no evidence that activities of the petitioner, his union or his employer affect interstate commerce or that the union represented "employees" as defined by the National Labor Relations Act?

f. The evidence did not show that the National Labor Relations Board first received the affidavit in the Eastern District of Illinois?

5. Whether 29 U. S. C. § 159(h), and 18 U. S. C. § 1001 as here applied are a Bill of Attainder and violate petitioner's rights under the First Amendment to freedom of speech and assembly?

6. Whether the court erred in refusing to give cautionary instructions on the testimony of paid informers?

7. Whether the trial court erred in permitting the prosecution to introduce irrelevant, prejudicial and highly inflammatory evidence on the program, activities and policies of the Communist Party and its members at times when, and places where, petitioner's membership in the Communist Party was not at issue in the case?

8. Whether the trial court erred in permitting the prosecutor to argue to the jury from the failure of the defense to use the statements of witnesses produced under 18 U. S. Code § 3500, when the statements were not in evidence?

9. Whether the trial court erred in permitting the prosecutor to give unsworn testimony in his summation?

Reasons for Granting the Writ

1. The opinion of this Court for the first time definitively establishes a subjective definition of the term "member" as applied to membership in the Communist Party. At the same time the opinion concedes that this subjective definition may not be the true one as known to "the organization and its member or members," i.e., that to the organization and its members, membership may be an objectively definable relationship having certain objectively definable qualities. The record in this proceeding demonstrates that membership in the Communist Party is an objective relationship with a subjective element. The testimony of the government's own witnesses, Fensholt, Sullivan and Ondrejka shows that, as members of the Communist Party, they were members of an organization with externalized objective qualifications for membership: payment of dues, attendance at formalized meetings, where decisions are taken by vote after discussion, assignment to subordinate units, formalized transfer between branches and areas etc. (See Brief for the United States, pp. 4-6, 8-10.)

Under the statute as interpreted by this Court there were thus two interpretations of the oath which were available to petitioner. If he were cognizant of the objective meaning of membership as known to the smaller group then the oath as to membership would have meant foreswearing that kind of membership. If he had in mind the subjective relationship between the Communist Party and the individual which the opinion of this Court establishes as the proper definition under the statute, his oath would have foresworn *that* relationship to the Communist Party. These two possibilities existing, it was error for the trial court to charge as it did that the requirement that the false statement be made "knowingly" meant merely that it was not made accidentally and that the natural consequences of an act knowingly done were presumed to be intended.[1] Since there were two available

1. The instructions in question were set forth in the Appendix to our previous petition for a writ of certiorari.

interpretations of the oath the trial court should have instructed the jury that, as a condition of guilt, it was required to find, independently of its other findings, that petitioner had a subjective relationship in mind (as defined by this Court) when he foreswore membership in and affiliation to the Communist Party, and did not have in mind the objective-subjective relationship.

This conclusion is verified by the opinion of Chief Justice Vinson in *American Communications Association* v. *Douds*, 339 U. S. 382, 410-411. The Chief Justice said:

> "The only criminal punishment specified is the application of § 35(A) of the Criminal Code, 18 U. S. C. § 1001, which covers only those false statements made 'knowingly and willfully.' The question in any criminal prosecution involving a non-Communist affidavit must therefore be whether the affiant acted in good faith or knowingly lied concerning his affiliations, beliefs, support of organizations, etc. . . . Without considering, therefore, whether in other circumstances the words used in § 9(h) would render a statute unconstitutionally vague and indefinite, we think that the fact that under § 35(A) of the Criminal Code no honest, untainted interpretation of those words is punishable removes the possibility of Constitutional infirmity."

The Court's opinion in the instant case, establishing two possible definitions of membership, permits of the possibility that petitioner's "honest, untainted interpretation" of the oath was that in taking it he foreswore only the objective relationship of membership, and not the subjective relationship defined by this Court. If this was the case, petitioner was innocent. The trial judge foreclosed jury consideration of this possibility of petitioner's innocence by his instruction that to act "knowingly" means merely to act non-accidentally and that a person is assumed to intend the consequence of acts "knowingly done."

Chief Justice Vinson's interpretation of the word "knowingly" is in accord with authoritative expression of professional opinion. The American Law Institute in its Model Penal Code (Tentative Draft No. 4), Section 202(b) defines "knowingly" as follows:

> "(b) Knowingly.
>
> A person acts knowingly with respect to a material element of an offense when:
>
> (1) if the element involves the nature of his conduct or the attendant circumstances, he knows that his conduct if of that nature or he knows of the existence of such circumstances; and
>
> (2) if the element involves a result of his conduct he knows that his conduct will necessarily cause such result."

Professor Perkins, Perkins: *A Rationale of Mens Rea*, 52 Harvard L. Rev. 905, stated in classifying the various sorts of *mens rea*,

> "Only in the most theoretical discussions would it even be questioned that one has knowledge of facts of which he has been made aware by his own observation. Nor would it be suggested that one has knowledge of facts when he has a bona fide belief to the contrary, based upon reasonable grounds. Such a person will be treated as if the facts were as they reasonably appeared to him unless the particular 'offense' does not require *mens rea* for conviction, or the deed, even under the circumstances as they were reasonably supposed to be, would have involved such a degree of social fault that the doer may properly be held to have acted at his peril in this regard" (p. 919).

* * *

> "In the latter—bona fide belief contrary to fact, not based on reasonable grounds—there is no fault in the belief itself, but only in the mental processes which have induced the belief. Conviction of some offenses is possible, although the fault does not exceed the boundaries of this category. But where a belief contrary to fact is entertained in good faith, no amount of negligence in its acquisition will meet the requirement if 'knowledge' is essential to guilt" (p. 920).

In *Murdock* v. *United States*, 290 U. S. 389, this Court held that a defendant upon a charge of willful evasion of his tax obligation was entitled to have the jury instructed that he could not be convicted if he acted with good faith and upon his actual belief as to his rights and duties.

In *Morissette* v. *United States*, 342 U. S. 246, the Court pointed out the fundamental nature of the requirement that knowledge and intent be actual rather than constructive,

> "The contention that an injury can amount to a crime only when inflicted by intention, is no provincial or transient notion. It is an universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability of the normal individual to choose between good and evil" (p. 250).

The Court held that where *mens rea* was an element of the crime charged an instruction such as was given here was error

> "Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury. . . . It follows that the trial court may not withdraw or prejudge the issue by instruction that the law raises a presumption of intent from an act" (p. 274).

See also *Screws* v. *United States*, 325 U. S. 91; *Spies* v. *United States*, 317 U. S. 492, 497-500; *Heikkinen* v. *United States*,

355 U. S. 273, 279-280; *Scull* v. *Virginia*, 359 U. S. 344; Mueller: *On Common Law Mens Rea;* 42 Minnesota L. Rev. 1043.

In this case the trial court not only failed to give the proper instruction, it withdrew the issue from the jury "by instruction that the law raises a presumption of intent from an act." *Cf. Morrisette* v. *United States, supra.*

The issue raised by the trial judge's error assumes importance in this proceeding because of the possibility of retrial where the wrong to petitioner will be perpetuated. It assumes especial importance in the light of this Court's acceptance of the subjective definition of Communist Party membership rather than an objective one. To the extent that the decision lessens the protection afforded the individual (and we submit that protection is greatly less than that which was thought to exist under the previous understanding of the law) it becomes important that the strength of the remaining protection to individual rights be established.

The problem of what is knowing membership in the Communist Party and what instructions should be given with regard thereto will almost certainly rise in the trial courts within a short time with reference to Ti. 29 U. S. C. § 504 (forbidding members or former members of the Communist Party to be union officers or employees) or Ti. 50 U. S. C. § 794 (requiring registration by Communist Party members) or both. Guidance should be given by this Court before the error of the court below be multiplied in those prosecutions.

Moreover, the ruling of the Court of Appeals below upholding the trial court's instruction conflicts with the ruling in other prosecutions under § 1001, *Freidus* v. *United States* (D. C. Cir., 1955), 223 F. 2d 598, *Jencks* v. *United States* (5 Cir., 1955), 226 F. 2d 540. The volume of prosecution under Ti. 18 U. S. C. § 1001 urges that this conflict be resolved.

2. The rulings of this Court directing a hearing on whether the statements improperly withheld at trial related

to the direct testimony of the witnesses raises the important question of the limits of the statutory term "relates to" as it appears in Title 18 U. S. C. A. § 3500(b). The trial judge ruled that only those statements of government witnesses where defendant was mentioned by name should be produced. (tr. 240-244) It is respectfully submitted that if this ruling stand petitioner's rights will be seriously prejudiced at the hearing, and that they were likewise seriously prejudiced at his trial.

As we have noted *supra*, the opinion of this Court recognizes that interpretations of the terms "member" and "affiliated with" other than the one adopted by the majority is legitimately possible. If petitioner had those alternatives in mind when he took the oath, and honestly believed himself not to be a member of affiliated with the Communist Party, he should be found innocent. The issue of what petitioner knew or believed and had reason to know or believe the nature of membership in the Communist Party actually to be, thus becomes material. The record shows that petitioner's knowledge of the nature of membership in and affiliation to the Communist Party was derived from the practice of the Communist Party in Madison, Wisconsin (the University of Wisconsin), and Milwaukee, Wisconsin, subjects of the direct testimony of the prosecution witnesses. Their "statements" illustrating that practice would have cast light on petitioner's state of mind when taking the oath even though the reports did not mention him by name.

We emphasize that the questions before the trial is not whether the statements could or would have been used at the trial (that can not be known until the documents are produced). The question is whether under this Court's decision in *Campbell* v. *United States*, 365 U. S. 85, the trial judge should have ordered production of the documents before him for his own *in camera* examination. In *Campbell* the majority opinion of this Court held that a trial judge had a duty,

> "affirmatively to administer the statute in such a way as can best secure relevant and available evidence necessary to decide between the directly opposed interest protected by the statute—the interest of the government in safeguarding government papers from disclosure, the interest of the accused in having the government produce 'statements' which the statute requires to be produced" (p. 95).

The minority opinion in *Campbell* likewise pointed out that the statements must be produced unless they are "patently not producible under the Act" (365 U. S. at p. 108).

The witnesses' statements were not "patently not producible." We submit that under this Court's opinion in *Killian* the reverse is true. Unless the error below be corrected by this Court it will be perpetuated at the new hearing.

3. The opinion of this Court holds proper the definition of the term "affiliated with" as being "short of and less than membership." By this definition a person could not be both a member of the Communist Party and affiliated with the Party at one and the same time. The trial court therefore should have given the instruction which defendant requested (tr. 605), that a guilty verdict could not be returned on both counts of the indictment. It was especially important that the trial court do so in this case, because of its concededly erroneous definition of affiliation and the potential of confusion of issues inherent therein.

That the trial court's failure so to instruct led to confusion in the jury's deliberations is shown by the contradictory verdict of guilty on both counts. It found defendant to be affiliated with the Communist Party (and hence not a member); at the same time it found him to be a member (and hence not affiliated). Instructions which lead a jury of qualified jurors to such a ridiculous conclusion are so confusing as to require reversal.

4. In our petition for writ of certiorari we have set forth at the reasons why review should be had of the remaining questions. The Court is respectfully referred thereto.

CONCLUSION

For the reasons set forth herein and in the petition for a writ of certiorari, rehearing of the partial denial of the writ of certiorari should be had and the writ granted as prayed for here.

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Attorneys for Petitioner.

Certificate

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 58(2) of the Rules of this Court.

/s/ BASIL R. POLLITT
Basil R. Pollitt

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IN THE

Supreme Court of the United States

October Term, 1961

No. 7

JOHN JOSEPH KILLIAN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

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JOHN JOSEPH KILLIAN,

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vs.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING

Petitioner, John Joseph Killian, respectfully petitions the Court for rehearing and reconsideration of its decision of December 11, 1961 on the following grounds.

I

The majority's definition of "member."

Mr. Justice Whittaker's opinion concedes that membership in the Communist Party is not, in truth, a subjective relationship; it only appears to be a subjective relationship "to all but the organization and its member or members." It follows from this that the subjective definition of membership in the Communist Party which the Court approves in this case is erroneous as a matter of fact, as well as being a sharp departure from the definition of membership apparently laid down in *American Communications Association* v. *Douds*, 339 U. S. 382. The definition of the Court results in the manifestly absurd rule whereby a man who has never joined the Communist Party may be held, as a matter of law, to be a member of that Party.

The record in this proceeding demonstrates that membership in the Communist Party is, factually, an objective

relationship with a subjective element. The testimony of the government's own witnesses Fensholt, Sullivan and Ondrejka shows that, as members of the Communist Party, they were members of an organization with externalized objective qualifications for membership: payment of dues, attendance at formalized meetings, where decisions were taken by vote after discussion, assignment to subordinate units, formalized transfer between branches and areas, etc. (See Brief for the United States, pp. 4-6, 8-10).[1]

The majority opinion would justify the substitution of the subjective definition of membership for the true definition of that relationship on the grounds of necessity. The Court fears that otherwise it would be impossible to obtain evidence for conviction and the statute be violated with impunity. We respectfully submit that this proposition is neither constitutionally or factually sustainable and warrants rehearing.[2]

It is a fair summary of the Court's position that statutory terms in a criminal statute may be defined contrary to existing and actual reality, that the judicial branch of the government, by its supreme body may disregard actual fact and substitute fiction, if to do so will aid the prosecution and conviction of defendants. We submit that it is not the role of this Court but of the Legislature to rewrite the statute, and that if Congress had meant the word "mem-

---

1. At the *Dennis* trial, *Dennis* v. *United States*, 341 U. S. 494 the government produced ten undercover agents who had been members of the Communist Party. Party membership cards for eight were offered in evidence. In addition annual registration cards and transfer cards were made a part of the record.

2. The argument from necessity is not unfamiliar. In the Sixteenth Century an eminent French Scholar and jurist stated, (Bodin: *Demonomanie* cited in Robbins: *The Encyclopedia of Witchcraft and Demonology*, Crown Publishers, 1959, at p. 54, 178)

> "One must not adhere to the ordinary rules of prosecution. In as much as the proof of such crimes is so obscure and so difficult, not one witch in a million would be accused or punished if the procedure were governed by ordinary rules."

ber" in Section 9 (h) to have a different meaning than the true one, it would have said so.

The necessity upon which the Court rests its departure from fact is groundless. The existence of the miniscule Communist Party, rent by faction, bedevilled by multiple prosecutions, riddled with government informers, poses no such threat to our institutions as would warrant impairment of those same institutions by abandonment of a fundamental principle of Due Process of Law. Counsel cannot cite one single case where a jury has acquitted a person of a crime involving Communist Party membership as an element. On the other hand, prosecutions and deportation proceedings abound where findings of Communist Party membership have been upheld by the appellate courts.[3] These convictions have rested upon admissions by the defendant, testimony of former Communists and (principally) testimony of paid government informers. The plethora of former Communists and the army of government informers insure that testimony is readily available against an active member of the Communist Party who violates the law. There is no necessity to plunder our national heritage and subject all persons to a danger of a thought control trial to achieve convictions of these few men.

In *Spies* v. *United States*, 317 U. S. 492, 500 this Court said,

> "The Government argues against this construction, contending that the milder punishment of a misde-

3. Example include *Fisher* v. *United States* (9 Cir., 1958), 254 F. 2d 302; *Sells* v. *United States* (10 Cir., 1958), 262 F. 2d 815; *Hupman* v. *United States* (6 Cir., 1955) 219 F. 2d 243; *Lohman* v. *United States* (6 Cir., 1959) 266 F. 2d 3; *United States* v. *Remington* (2 Cir., 1953), 208 F. 2d 567; *Scales* v. *United States*, 367, U. S. 203; *Noto* v. *United States*, 367 U. S. 290; *Bryson* v. *United States*, (9 Cir., 1956), 238 F. 2d 657; *United States* v. *West*, (6 Cir., 1960), 274 F. 2d 885; *Brown* v. *United States*, (5 Cir., 1960) 277 F. 2d 573; *Travis* v. *United States*, (10 Cir., 1957), 247 F. 2d 130; *Christoffel* v. *United States*, 345 U. S. 947. This list is not exhaustive nor intended to be. It does not even include Smith Act conspiracy cases.

> meanor and the benefits of a short statute of limitation should not be extended to violators of the income tax laws such as political grafters, gamblers, racketeers and gangsters. We doubt that this construction will handicap prosecution for felony of such flagrant violators. Few of them, we think, in their efforts to escape tax, stop with the mere omission of the duties put upon them by the statute, but if such there be, they are entitled to be convicted only of the offense which they committed."

Likewise in this instance active Communists may be successfully prosecuted for whatever their transgressions may be. As to those Communists who withdraw from organizational membership, the purpose of Section 9(h), the removal of Communist Party disciplined control of interstate commerce, will have already been served. In neither case does any necessity exist that this Court depart from fundamental principles and endanger the innocent to convict the guilty.

II

The Killian decision is in square conflict with the decision in *Cramp* v. *Board of Public Instruction* and *United States* v. *Lattimore* whose doctrine should prevail

It is respectfully submitted that the principles and rationale of the opinion of Mr. Justice Whittaker, speaking for the majority of the Court in the within case, conflicts sharply with the principles laid down in the opinion of Mr. Justice Stewart, speaking for the whole Court in *Cramp* v. *Board of Public Instruction of Orange County, Florida* (No. 72, October Term, 1961). This conflict vitiates the decision in *Cramp*, confines to exactly similar facts the protection which it appears to extend to First Amendment rights, and invites evasion of the principles enunciated therein by verbalistic variations in the form of test oaths.

Any attempted distinction between *Cramp* and *Killian* must be a distinction without a difference. In *Cramp* the outlawed oath required the affiant to swear that he had not lent his "aid, support, advise, counsel or influence to the Communist Party." In *Killian*, the Court held that a man might be prosecuted and convicted upon evidence that he had "advised" or "counselled" officers of members of the Communist Party, (Item "10" of the indicia of membership as given the jury), the very language of the Florida oath. Indeed *Killian* permits prosecution where Florida's oath would forbid it. For, where the Florida oath permitted prosecution only where the affiant had lent his "aid, support . . . or influence" to the Communist Party, the *Killian* decision permits prosecution (and conviction) where the defendant had not lent his "aid, support . . . or influence" to the Communist Party, but had merely indicated his willingness so to do. (Item 11 of the indicia of membership as given the jury reads,

> "has indicated by word, action, conduct, writing, or in any other way, a willingness to carry out in any manner or to any degree, the plans objectives or designs of the Communist Party.")

Among the other indicia of membership given the *Killian* jury, Items "1" (financial contributions of "any" kind), "2" (attendance at "any other type" of Communist Party gathering) and "5" (execution of Communist Party plans "of any kind") are merely general descriptions of alternative forms of the lending of "aid, support . . . or influence." Items "8" (conferring in behalf of "any plan") and "12" (participating "in any other way" in the planning of the Communist Party,) are merely synonyms for "advice" and "counsel."

It is no meaningful distinction between *Cramp* and *Killian* that *Cramp* made criminal what *Killian* made evidence of a subjective crime with no external characteristics. A

jury functioning under the *Killian* instructions would have to make the same ultimate decisions as would a jury in a perjury prosecution under the Florida Statute. This Court's opinion in *Cramp* states the vice of permitting prosecution under such criteria more eloquently than we can.

> "Could a lawyer who had ever represented the Communist Party or its members swear with either confidence or honesty that he had never knowingly lent his 'counsel' to the Party? Could a journalist who had ever defended the constitutional rights of the Communist Party conscientiously take an oath that he had never lent the Party his 'support'? Indeed, could anyone honestly subscribe to this oath who had ever supported any cause with contemporaneous knowledge that the Communist Party also supported it?
>
> "The very absurdity of these possibilities brings into focus the extraordinary ambiguity of the statutory language. With such vagaries in mind, it is not unrealistic to suggest that the compulsion of this oath provision might weigh most heavily upon those whose conscientious scruples were the most sensitive. While it is perhaps fanciful to suppose that a perjury prosecution would ever be instituted for past conduct of the kind suggested, it requires no strain of the imagination to envision the possibility of prosecution for other types of equally guiltless knowing behaviour. It would be blinking reality not to acknowledge that there are some among us always ready to affix a Communist label upon those whose ideas they violently oppose. And experience teaches that prosecutors too are human." (30 Law Week 4046).

The Court's questions in *Cramp* can be addressed with equal merit to the *Killian* indicia of Communist Party mem-

bership. Could a lawyer who had ever represented the Communist Party or any of its members not be found to have "advised" or "counselled" the Communist Party, or to have "conferred" with it on behalf of "any" of its plans. Could a journalist who had defended the constitutional rights of the Communist Party not be found to have "indicated by . . . writing . . . a willingness to carry out," in some manner and to some degree, "the objectives of the Communist Party." These possibilities cannot be dismissed as absurd. Within the past decade instances of this very nature have been trumpeted in our National Legislature as proof positive of Communist membership or affiliation. "There are some among us always ready to affix a Communist label upon those whose ideas they violently oppose." (*Cramp*, 30 Law Week 4046).

In *United States* v. *Lattimore* (D. C., D. C., 1953), 112 F. Supp. 507, *aff'd in part, reversed in part,* (C. A. D. C., 1954), 215 F. 2d 847 and in *United States* v. *Lattimore* (D. C., D. C., 1955), 127 F. Supp. 405, *aff'd* (C. A. D. C., 1955) 232 F. 2d 334, after flagrant and strident pressure from politically powerful forces the government sought to convict Professor Lattimore (who was and is one of our most eminent students of foreign affairs) of perjury for denying that he was a sympathizer or promoter of Communism or of Communist interests. The courts rejected these charges as speculative. Under the *Killian* decision the *Lattimore* persecutions should have been sustained. The instruction as to "affiliation" defined it as more than "sympathy." If "affiliation" as thus defined be not a speculative term, then it follows that "sympathizer" is likewise not speculative. If the approved indicia of membership may be used in ascertaining a "member" of the Communist Party without the stigma of unconstitutional vagueness, they may certainly define a "promoter" of Communism.

We cite the *Lattimore* case because we do not believe it is aberrant. A prolonged period of international tension inev-

itably produces peaks of jingoism and hysteria when the very process of independent thought is suspect, periods which later eras look back upon with shame and disgust. We are told by our highest national officers that we are in an indefinite period of international tension. Certain it is that in such a period as this the excesses of the early 1950's may be expected to reappear, and in aggravated form. In such a period it is the role of this Court (in the words of George Washington) to "raise a standard to which the wise and honest can repair." We submit the *Cramp* decision if consistently applied, supplies such a standard. We submit further however that while the present *Killian* decision stands, no enunciation of the principles set forth in *Cramp* can be a meaningful affirmation of constitutional right.

III

The definition of "affiliated with."

The definition of "affiliated with," dependent on the improper definition of "member" and the invalid "indicia" thereof, should be reconsidered on the ground alone. Reconsideration is likewise warranted (assuming the definition of "member" to be correct) by the Court's departure from the holding of *Bridges* v. *Wixon*, 326 U. S. 135, that "affiliation" must encompass the organization's "unlawful objectives," (326 U. S. at p. 147, see also 326 U. S. at pp. 143, 144).

In view of Mr. Justice Brennan's dissent, it is respectfully submitted, on authority of *American Communications Association* v. *Douds*, 339 U. S. 382 that the error of the trial judge was "fundamental" and that consequently the limitations of Fed Rules Crim. Proc. 30 do not apply.

CONCLUSION

For the foregoing reasons the petition for rehearing should be granted.

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